

Los Angeles County Homecare Workers Union, Service Employees International Union, Local 434-B, AFL-CIO and Office and Professional Employees International Union Local 537, AFL-CIO. Cases 21-CA-29370, 21-CA-29520, and 21-RC-19216

March 31, 1995

DECISION, ORDER, AND DIRECTION

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND COHEN

On November 25, 1994, Administrative Law Judge Timothy D. Nelson issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Los Angeles County Homecare Workers Union, Service Employees International Union, Local 434-B, AFL-CIO, Los Angeles, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

DIRECTION

IT IS DIRECTED that Case 21-RC-19216 be remanded to the Regional Director for Region 21, who shall, within 14 days of this Decision, Order, and Direction, open and count the ballot cast by Silvia Ochoa. Further, the Regional Director shall prepare and cause to be served on the parties a revised tally of ballots, and shall issue the appropriate certification.

¹The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

There are no exceptions to the judge's recommendation that the allegations in the complaint concerning alleged violations of Sec. 8(a)(1) after May 21, 1993, the discharge of Julio Marroquin, and the written warning issued to Burnell Mynatt, should be dismissed.

In adopting the judge's finding that the Respondent unlawfully engaged in the interrogation of employees, Chairman Gould and Member Browning find it unnecessary to rely on *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985); and *Summyvale Medical Clinic*, 277 NLRB 1217 (1985).

Steven G. Siebert, Esq., for the General Counsel.

Michael Posner, Esq. (Posner & Rosen), of Los Angeles, California, for the Respondent, LA Homecare Workers, Local 434-B.

Kathleen Simmons, Bus. Mgr., of Burbank, California, for the Charging Party, OPEIU Local 537.

DECISION

STATEMENT OF THE CASE

TIMOTHY D. NELSON, Administrative Law Judge. This is a prosecution of consolidated unfair labor practice cases which has been further consolidated for purposes of hearing and decision with a voter eligibility issue in a related representation case. I opened the trial record on November 4, 1993, in Los Angeles, California, and I closed it on March 9, 1994, after conducting a total of 9 days of proceedings between those dates.

The prosecution is brought in the name of the General Counsel of the National Labor Relations Board by the Regional Director for Region 21 against a labor organization, Los Angeles County Homecare Workers Union, Local 434-B (the Respondent), in its capacity as an employer. In an "Amended Consolidated Complaint" that was itself amended significantly after the trial began, the Regional Director now charges that during the period May through November 1993, the Respondent committed violations of Section 8(a)(1), (3), and (4) of the Act.¹ The specific issues to be decided are implicit in the following summary of the main developments that brought these cases to trial, and those further developments that resulted in their enlargement after the trial began:

In mid-April 1993 (all dates below are in 1993, unless I say otherwise), another labor organization, OPEIU Local 537 (the Union), began organizing among the Respondent's office employees. On May 5, the Respondent discharged office employee Silvia Ochoa. Ochoa's dismissal was challenged by the Union's first unfair labor practice charge, filed in Case 21-CA-29370 on May 7; it was also the subject of the 8(a)(3) count in the Regional Director's first complaint, issued in that case on June 25, further alleging that the Respondent committed independent violations of Section 8(a)(1) when, on May 5, its general manager, Ophelia McFadden, unlawfully "interrogated" employees and made union-"disparaging" statements to them.

¹Sec. 8(a)(1) outlaws employer actions and statements that "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." Sec. 7 declares pertinently that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection[.]"

Sec. 8(a)(3) in pertinent part makes it unlawful for an employer to "discriminat[e] in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

Sec. 8(a)(4) prohibits employer "discriminat[ion] against an employee because he has filed charges or given testimony under this Act."

Pursuant to a petition filed by the Union on May 19 (docketed as Case 21-RC-19216) an inconclusive election was held for office unit employees on July 16.² There, three employees voted; one of them was Ochoa, whose ballot was challenged and placed in a sealed envelope. One of the remaining two ballots was for the Union and the other was determined to be void. The outcome of the office unit election will depend on whether or not Ochoa was eligible to vote, and if she was eligible, on how she voted.³ Ochoa's eligibility to vote depends on whether or not her May 5 dismissal was unlawfully discriminatory, as alleged in the June 25 complaint in Case 21-CA-29370. Because of this, the Regional Director issued a report on August 6 in which he ordered consolidation of the representation-case challenged ballot issue with the then pending unfair labor practice complaint for purposes of a common hearing and decision by an administrative law judge.

As events relating to the office unit were unfolding, the Union was also expanding its representational drive to include the Respondent's staff of organizers. On June 30, the Union filed a petition for an election in that unit, docketed as Case 21-RC-19242. On July 21, the Respondent discharged staff organizer, Julio Marroquin. On July 26, the Union challenged Marroquin's dismissal by filing a separate charge against the Respondent in Case 21-CA-29520. On August 17, with this charge still under investigation, the Regional Director's agents conducted an election in the organizers unit. The Union lost that election,⁴ and did not file objections.

On September 30, after receiving the Union's first amended charge in Case 21-CA-29520, the Regional Director issued a "Second Order Consolidating Cases, Consolidated Amended Complaint and Notice of Hearing" against the Respondent. In this integrated pleading, the previous complaint was supplemented by allegations that the Respondent had violated Section 8(a)(3) and (1) by firing Marroquin on July 21, and had committed additional violations of Section 8(a)(1) by the statements or conduct of its agents in the period May 5 through early August. This incarnation of the

complaint was further amended in a trivial way before the trial opened.⁵

During trial proceedings on December 11, I permitted the General Counsel to amend the complaint further, over the Respondent's objection. This "Second Amendment [in fact, several amendments] to [the September 30] Amended Consolidated Complaint" concerned an employee not previously named in any complaint, Burnell Mynatt, a staff organizer for the Respondent who had testified for the General Counsel on November 5, and who thereafter received three corrective memoranda from the Respondent before the month expired (the "November memos"). In earlier months, Mynatt had received several other corrective memos, including three in June (the June memos); and in August, the Respondent had extended her probationary period. In substance, the second amendment(s) alleged that when the Respondent extended Mynatt's probationary period in August, and when it issued the June and November memos to her, the Respondent in each case violated Section 8(a)(1) and (3), and that the Respondent also violated Section 8(a)(4) each time it issued a corrective memorandum to her in November. Notably, when I opened the record on November 4, none of the actions taken against Mynatt up to that point had been challenged by the Union's charges nor by any version of the complaint.⁶ Indeed, on November 5, counsel for the General Counsel had strongly resisted the Respondent's attempts during cross-examination of Mynatt to introduce the June memos, or to question her about them, or about other disciplinary run-ins with her supervisors in March. I eventually sustained most of the General Counsel's objections, and rejected the Respondent's tender of such exhibits. Obviously, however, when the General Counsel belatedly challenged the June memos as part of his December 11 second amendment(s), most of the disciplinary records whose receipt he had earlier resisted now had become the central documents in his case, and therefore they were resurrected from the rejected exhibit file and were resubmitted and received as prosecution exhibits. And flowing from this, Mynatt's entire disciplinary history eventually became subject to litigation.

On January 14, 1994, I similarly granted the General Counsel's motion to issue and litigate a third amendment (again, these were multiple amendments) to consolidated amended complaint. In substance, these third amendment(s) alleged that seven corrective memoranda and warnings the Respondent had issued to Marroquin in the month before it fired him were in each case unlawfully discriminatory acts in violation of Section 8(a)(3) and (1).⁷ These amendments were striking not just for their tardiness (especially in the

²My finding that the office unit petition in Case 21-RC-19216 was filed on May 19 is based on administrative notice, (*) following an inquiry I directed to counsel for the General Counsel and for the Respondent, in writing, after the trial record closed.

*The representation case formal papers introduced by the General Counsel (G.C. Exhs. 2(a) through (e)) are not those associated with Case 21-RC-19216 (the office unit election case), but rather are those associated with Case 21-RC-19242 (the staff organizers election case, *infra*). As a consequence, the record does not include a copy of the petition in Case 21-RC-19216, nor several other records associated with that case.

³If Ochoa was not eligible to vote, the single vote cast for the Union would be enough to certify it as the election winner, for that "Yes" vote would constitute a "majority" of the valid ballots cast. However, if Ochoa was eligible to vote, the Union's current one-vote "victory" could be either cemented by a "Yes" vote from Ochoa, or be negated entirely if Ochoa voted "No." For in the latter event, the Union would lose the election for having failed to get a majority of the valid ballots cast.

⁴Of the seven unchallenged ballots cast and counted in that election (an additional ballot was cast under challenge), only three were "Yes" votes. This outcome made the challenged ballot moot.

⁵This amendment, issued on October 20 by the Regional Director, alleged that the Union had filed a "second amended charge in Case 21-CA-29520 on October 4, 1993." This second amended charge was not put into the record.

⁶Before the General Counsel proposed these amendments relating to Mynatt, the Union had first filed conforming amendments to its charge in Case 21-CA-29520, on respectively, November 24 ("Third Amended Charge") and December 6 ("Fourth Amended Charge").

⁷The General Counsel's third amendment, as orally recited on January 14, 1994 (it was not submitted in writing until March 8, 1994), was followed by the Union's filing on January 21 of a "Fifth Amended Charge" in Case 21-CA-29520, conforming, *post facto*, to the January 14 complaint amendments.

light of the controversies of a month earlier surrounding the second amendment(s) as to Mynatt), but even more so for their total inconsistency with a series of unequivocal disclaimers against challenge to Marroquin's warning slips that counsel for the General Counsel had made previously.⁸

With the obvious exception of the amendments relating to Mynatt's November memos, which were not issued to Mynatt until after the trial began, the matters covered by the General Counsel's midtrial amendments could have been, and should have been alleged well before this trial began. And the General Counsel's tardiness and his misleading disclaimers and protracted equivocations clearly did not serve the interests of fairness nor of orderly adjudication.⁹ The merits of these amended allegations were nevertheless fully litigated in the end, and I treat them as now properly before me for resolution.

The Respondent admits and I find that its operations satisfy pertinent statutory and discretionary "impact-on-commerce" tests, and that the Board's jurisdiction is properly invoked over it as an employer.¹⁰ The Respondent denies all

⁸Following my inquiries in trial on December 7 (Tr. 493:16–496:12; 500:19–505:7), counsel for the General Counsel conferred with the Regional management hierarchy and then announced that "we are not going to amend the complaint again in this matter." And he then unmistakably disclaimed any form of attack on the pre-discharge warning slips issued to Marroquin by confirming my declared understandings of his previous statement—that "[It] will not be argued at any stage that [Marroquin's] warnings slips were issued with discriminatory motive" ("That's correct."), and that "[t]he Respondent won't have to justify why it issued those warning slips" (Ditto). (Tr. 505:16–506:5.) He reaffirmed these disclaimers on December 8 when he responded identically to my wish that it "be absolutely clear that you are making no claim in this case that the memos that Mr. Marroquin got were a product of his being leaned-on for Union activities." (Tr. 631:13–632:24.) In trial on January 13, 1994, however, the General Counsel contradicted these disclaimers by advancing the argument that Marroquin was the victim of unlawfully discriminatory "disparate treatment" when the Respondent issued these warning slips (Tr. 1123:1–23). This was, in context, a claim that the Respondent had singled-out Marroquin for discipline because of his union or other protected activities, and if such a claim was intended, fair notice of this should have been in the complaint from the outset, as I explained at some length to the General Counsel. (Tr. 1125:22–1127:25.) On January 14, 1994, the General Counsel again nominally disclaimed any attack on the Respondent's issuance of warning slips to Marroquin (Tr. 1136:3–24), but soon waffled by claiming nevertheless that the warnings were "pretextual" (Tr. 1137:7–8), a claim that in context again necessarily implied that they were issued for unlawfully discriminatory reasons, and therefore a claim that could not be reconciled with the General Counsel's earlier disclaimers. After reiterating the same point on the record, and after rejecting the option of simply barring the General Counsel's attempts to show that Marroquin's pre-discharge warning slips were issued for unlawfully discriminatory reasons, I offered to entertain a further amendment to the complaint. (Tr. 1137:13–1141:23.) As a result, counsel for the General Counsel announced that "after further consulting with the Region on this matter, we would like at this point to amend the complaint to include the written warnings that were given to Mr. Marroquin at the end of June and in July of 1993." (Tr. 1142:8–12.) After further colloquy, and over the Respondent's objection, I granted the motion to amend for the reasons I elaborated at tr. 1149:15–1150:5.

⁹Cf. *Leeward Nursing Home*, 278 NLRB 1058, 1059 (1986).

¹⁰I find, as the Respondent admits in its answer to the jurisdictional counts in the complaint, that in the past 12 months of its operation, the Respondent collected and received more than \$500,000 in

alleged wrongdoing, and seeks dismissal of the complaint. Consistent with that position, it maintains in the representation case that the challenge to Ochoa's ballot should be sustained, because she was lawfully terminated before the election, and was therefore ineligible to vote.

I have studied the trial record¹¹ and the parties' briefs.¹² Upon my findings and reasoning set forth in succeeding sections below, I will conclude that the Respondent violated Section 8(a)(3) and (1) when it discharged Silvia Ochoa on May 5, and committed several independent violations of Section 8(a)(1) through the statements of its agents in the period May 5 through May 21. However, also for reasons explained below, I cannot credit Mynatt's testimony, offered to prove three of the four post-May 21 alleged violations of Section 8(a)(1). And as to the fourth 8(a)(1) count, I would not find a violation even if I were to credit Mynatt and Marroquin's memories of McFadden's remarks at a meeting of staff organizers in "mid-June." Finally, as to the counts alleging that Marroquin and Mynatt suffered unlawful discrimination or retaliation at the Respondent's hands (all of which likewise refer to post-May 21 events), I will conclude, using a *Wright Line* analysis, that even if the General Counsel made out a prima facie case of unlawful motive, the Respondent has adequately demonstrated that Marroquin and Mynatt would have gotten the same treatment even if they had never been involved in prounion activities or other statutorily-protected conduct. Accordingly, I will dismiss the complaint insofar as it alleges violations by the Respondent after May 21.

FINDINGS, ANALYSES, AND CONCLUSIONS OF LAW

I. THE RESPONDENT'S BUSINESS OPERATION; THE MAIN PERSONALITIES IN THE CASE

The Respondent is a local union affiliate of Service Employees International Union (SEIU); it was formed and chartered in 1987 or 1988, and has been subsidized by SEIU since then, as the pilot program and centerpiece of SEIU's Homecare Workers Organizing Project (Homecare Project). This is a national effort aimed ultimately at securing for SEIU and its local unions status as the exclusive collective-bargaining agent for workers throughout the country who provide in-home care services for people who are ill or otherwise disabled. As I further explain below, the Respondent's more particular goal as the spearhead of the Homecare Project is to secure recognition (from a yet-to-be-formed governmental "authority") as the bargaining agent for an estimated 60,000–70,000 workers in the geographically vast county of Los Angeles who provide homecare services to residents receiving California medical assistance benefits. To reach its goal of representing this vast group, the Respondent must first reach the group itself, and to do so, it has been continuously involved in a sophisticated drive to identify, locate, and track the people who are doing such homecare work for county residents, and to persuade at least 51 percent

dues and initiation fees, and remitted more than \$50,000 in "per capita" taxes to its SEIU parent in Washington, D.C.

¹¹The trial record includes 1525 transcript pages, and approximately 400–500 pages of pleadings and documentary exhibits.

¹²The deadline for receipt of briefs was extended to May 3, 1994, and I received briefs from the General Counsel (78 pp.) and the Respondent (74 pp.) on or before that date.

of them to sign applications for membership and dues-check-off forms.

The Respondent's offices and headquarters are in the municipality of Vernon, within Los Angeles County, where it occupies space in the same building that has for many years housed the main offices of the Respondent's older sister local, SEIU Local 434, a union that represents more than 5000 county workers in hospitals, jails, and other institutions. Ophelia McFadden is the general manager and chief executive of both the Respondent and Local 434; she is also one of 12 SEIU International vice presidents, a member of SEIU's executive board, and she heads or serves on other committees and councils within SEIU. Wilma Cadorna is the Respondent's staff director; she is McFadden's top assistant, and she directly supervises the organizers and office workers assigned to the Homecare Project. From January through June 1993, Cadorna shared some of these staff supervision responsibilities with David Freeland, who was apparently on temporary assignment to the Respondent from SEIU, and who was sometimes titled, "Lead Organizer" and other times, "Organizing Coordinator." (His supervisory role extended to the office receptionists, as well.) In July, according to Cadorna, Freeland was "reassigned to San Bernardino," presumably to another SEIU activity in that neighboring city or county. The Respondent admits in its answer, and I find, that McFadden, Cadorna, and Freeland were "supervisors" within the meaning of Section 2(11) of the Act, and agents of the Respondent, "at all material times." Although Freeland's own statements and actions, like McFadden's and Cadorna's, were challenged by the complaint, and he was shown to have figured closely in many of the events discussed below, he was the only person named in this paragraph whom the Respondent chose not to call to testify.¹³

Dan Stewart, who is not named in the complaint, but whom the Respondent did call as a witness, is SEIU's Washington, D.C.-based director of health care organizing; his responsibilities include overseeing strategy and financing for the Homecare Project, both nationally, and as it is being carried out by the Respondent. During times material to the complaint, Stewart made several visits to the Respondent's headquarters in Vernon, where an office was set aside for his use. During these visits he would consult with the local man-

agement team concerning organizing strategies and tactics and the setting of "quotas" for the organizers; he would also meet with or address the organizers in group sessions, where he would exhort them to sign up more members and would hear their complaints and suggestions. He was incidentally involved in many of the events on which this litigation focused.¹⁴

The homecare workers in Los Angeles County who are the targets of the Respondent's organizational and signup efforts are not normally paid directly by their nominal "employers," the benefits recipients whom they care for; instead, they get their paychecks from the State of California, channeled to them through Los Angeles County social service agencies responsible for administering the medical assistance programs, and supervising and approving the conditions under which homecare benefits are paid. Nevertheless, until relatively recently, these workers were effectively treated by the State and by Los Angeles County as "independent contractors." Because of this, a critical second front in the Respondent's overall campaign has been to try to get some public entity to assume status as the "employer" of these workers. And to this end, the Respondent, primarily through McFadden, has been active in the halls of State Government in Sacramento, with considerable success: As early as 1989, the State Controller had agreed to begin deducting union membership dues from the state paychecks issued to Los Angeles County homecare workers who authorized this check-off, and since then, the State has been transmitting their dues—\$7.38 per month per member—directly to the Respondent. And in 1992, the Respondent's lobbying yielded a more fundamental change, when California enacted a law that permitted counties to create local "authorities" that would be authorized to recognize any union the homecare workers within their jurisdiction might select, and to bargain with that union concerning their wages and other terms and conditions of employment.¹⁵ Such an "authority" had not yet been created in Los Angeles County when this trial concluded in March 1994. But the political developments described above have spurred the Respondent's organizing drive in recent years, and in the May–November period encompassed by the complaint, the pressure to sign up and service new members had grown especially intense, as the Respondent was drawing ever nearer to its "51 percent" signup target.¹⁶

¹³In *International Automated Machines, Inc.*, 285 NLRB 1122 (1987), the Board reaffirmed the "familiar rule . . . that when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge." *Id.* at 1123 (citations omitted). See also *U.A.W. (Gyrodyn Co.) v. NLRB*, 459 F.2d 1329, 1336–1337 (D.C. Cir. 1972). Freeland was not shown to be unavailable to the Respondent, and by dint of his apparently ongoing position and function within SEIU, he qualified in my judgment as "a witness who may reasonably be assumed to be favorably disposed to" the Respondent. Thus, his absence will permit me to draw inferences adverse to the Respondent's fact claims in certain instances, particularly where McFadden or Cadorna invoked Freeland as a witness to or participant in various factually contested events, and where there is no independently reliable evidence to support McFadden's or Cadorna's claims concerning those events. (I am referring in the main to situations relating to Ochoa's termination, and to other, pre-May 21 events.) In such instances, I will infer from Freeland's absence that Freeland's testimony would have significantly contradicted or undermined the versions advanced by McFadden or Cadorna.

¹⁴The complaint does not mention Stewart, and the General Counsel has never claimed that Stewart was responsible for any of the Respondent's actions charged now as unfair labor practices. And Stewart, echoed by other witnesses, emphasized that McFadden was the top authority in the hiring and firing and overall management of the Respondent's employees, and that he would not have tried to and did not interfere with or otherwise seek to influence the way she discharged her executive functions.

¹⁵I rely for these findings primarily on Stewart, who credits McFadden's "political connections" and "relationships with State politicians" as the central force behind these achievements. Cadorna's testimony is to similar effect.

¹⁶According to Cadorna, the Respondent had about 5000 members on checkoff in 1989, when the State began participating in the dues-checkoff arrangement. By November 1990, after an intensified campaign conducted under the *double entendre slogan*, "7 [thousand] come 11 [November]," the membership-on-checkoff total had risen to about 7100. By the end of 1993 (the last count disclosed by this record), this total had jumped to more than 22,000.

The gender, and the racial or ethnic identity of various actors and worker populations—and the organizing problems and interoffice tensions (and occasional confusion) associated with these various identity categories—were subjects repeatedly visited by both sides in the case, and alluded to by various witnesses, for a variety of purposes.¹⁷ It is, therefore, largely out of deference to the parties' own attention to such matters that I will summarize what the record shows about the "demographics" associated with the Respondent's operation, starting with the class of workers whom the Respondent seeks to represent:

The county homecare workers have in common, beyond their wages¹⁸ and typical working conditions, that nearly all of them are women. They are nevertheless a racially and culturally diverse collection, and they speak a variety of languages.¹⁹ It appears from McFadden's and Cadorna's categorizations and estimates that about 55 percent of the Respondent's members are black, most of them African Americans, like McFadden, herself. Another 20–30 percent are of Mexican or Central American background, including many recent immigrants, and another roughly 20 percent are recent immigrants from other areas on the planet, ranging from Asian and Pacific Island countries to Russian-Armenian regions.²⁰

To identify, organize, and service these diverse populations, the Respondent has employed a similarly diverse mix of about nine staff organizers. *Julio Marroquin*, a native of El Salvador, was one of several organizers who could speak both English and Spanish. He had been on the job for about 9 months when he was discharged on July 21, and before his dismissal, he had been among several organizers whose support for the Union was clearly known to McFadden,

Cadorna, and Freeland. *Burnell Mynatt*, an African American woman, had started as an organizer in February, and was still so employed throughout this trial. She has implicitly portrayed herself as an outspoken and well-known supporter of the Union, but I will doubt this self-portrayal, not least because it lacks corroboration.

The Respondent also employs at the Vernon headquarters a group of about seven office workers, often referred to collectively as the "clericals." They include people who do typing, bookkeeping, and data entry and retrieval,²¹ and some who combine normal telephone reception duties (answering the phone, routing calls, taking messages) with additional, somewhat routine, "membership services" tasks—for example, assisting members who call-in with "late check" complaints. Nearly all of the office workers are Latinas who speak both English and Spanish. *Josefa (Josie) Lopez Fregoso*,²² who was still employed by the Respondent when she testified in this case, was the principal receptionist, and the first person to make contact with the Union and to distribute showing-of-interest cards to her coworkers. Fregoso was backed up in her receptionist work by alleged discriminatee Silvia Ochoa, who also did membership services work when she was not relieving Fregoso at the main phone desk. Ochoa signed one of the pronoun cards Fregoso was distributing. She was the most junior of the office employees, having completed only 23 days on the job when she was fired at the end of the workday on May 5, the day the Union's demand letter arrived.

II. ALLEGED UNFAIR LABOR PRACTICES AND RELATED EVENTS THROUGH MAY 21

A. Findings

1. The Union's initial organizing and request for recognition

The Union's organizing interest in the Respondent's employees began in mid-April, when Josie Fregoso called the Union's business manager, Kathleen (Kitty) Simmons, and discussed certain (unspecified) "concerns" with her. Simmons promptly mailed to Fregoso a packet of what Fregoso described as "showing of interest" cards for the Union. Fregoso signed one on April 19, and then met the same day with fellow office workers, Luz Romana and Silvia Ochoa, who likewise signed cards presented by Fregoso.

On May 3, Simmons dispatched a letter to McFadden. In the letter, Simmons claimed that the Union represented "the majority of the [Respondent's] clerical staff," and offered to "demonstrate that status," and proposed a "meet[ing] . . . to negotiate a Collective Bargaining Agreement on their behalf," and asked McFadden to contact her "to arrange mutually convenient meeting dates."

¹⁷ Here are several examples: The General Counsel adduced testimony from witnesses Fregoso and Mynatt that McFadden made a variety of disrespectful or hostile statements about "Mexicans," sometimes in clearly union-related contexts. Also, to make more plausible Mynatt's proffered excuse for her absence from a late November community rally—the subject of one of Mynatt's writeups which is now alleged to have violated Sec. 8(a)(1), (3), and (4)—the General Counsel invited Mynatt to portray McFadden as murderously hostile towards women as a class. To rebut such claims, and more generally, to undermine the credibility of Fregoso's and Mynatt's versions of relevant transactions, the Respondent in turn introduced much evidence that McFadden is instead a champion of the rights of Latinos and other minorities, and has publically denounced slurs against Mexican immigrants by a state elected official, and has worked hard to maintain a multiracial and multiethnic staff mirroring the worker population the Respondent seeks to organize, and has similarly labored to form and support coalitions of ethnic community groups, and labor groups, and political action groups to advance the interests of workers of all hues and backgrounds. Moreover, the Respondent presented testimony through Cadorna that Mynatt herself spoke deprecatingly about Mexicans, and that Mynatt was disruptively bossy or confrontative in her dealings with certain of the male organizers.

¹⁸ The current homecare pay rate established under the California medical assistance program is \$4.25 per hour.

¹⁹ Stewart testified, "[W]e have four languages, I think, routinely being spoken at [Local] 434-B in terms of being able to reach workers[.]"

²⁰ McFadden also estimated that the membership was "maybe 5 percent Caucasian." The workers of Armenian background may have been intended by McFadden to be included within this latter slice of the demographic pie.

²¹ The Respondent uses a computerized system for locating and tracking members and potential members, and for monitoring organizing progress, and for collecting and recording members' dues payments.

²² Fregoso's name is sometimes misrendered in the transcript as "Fregosa," and is consistently so misspelled in the Respondent's brief.

2. The events of May 5

a. *McFadden's reaction to the Union's letter*

Simmons' letter reached the Respondent's offices on the morning of May 5. McFadden admittedly found it in her mailbox and read it sometime between 11:30 and 11:45 a.m., only moments after leaving a meeting with SEIU's Stewart, also attended by Cadorna, and only minutes before she would leave the office to take Stewart to the airport for a 12:30 p.m. flight. After reading the letter, McFadden admittedly walked into the clerical work area and stopped long enough to query Fregoso about it, an event Cadorna claims to have witnessed. Exactly what McFadden said and did during and immediately after she questioned Fregoso was described by the General Counsel's witnesses to the event—Fregoso, and fellow office workers Ochoa and Ana Maria Monreal—in terms which cannot be harmonized with McFadden's and Cadorna's common version. The testimonial conflict deserves careful examination, not just because what McFadden really said and did could determine whether or not she violated Section 8(a)(1), but also because resolution of this dispute will have rippling influence on my disposition of other issues in the case, especially the lawfulness of Ochoa's termination. For reasons I will explain later, I will credit the harmonious elements contained in the versions of events offered by the prosecution witnesses.

McFadden testified that when she opened and read the Union's letter, she treated it as a "joke[,] really[,] . . . because of the nature of the . . . organizing . . . project, and [because] nobody had ever mentioned any unhappiness, so I thought it was a joke." With the letter still in hand, she admittedly soon encountered Fregoso, and asked her, "Josie, what is this?" (In reenacting from the witness stand her manner in thus questioning Fregoso, McFadden put a smile on her face and a chuckle into her voice.) McFadden further recalled that Fregoso, who likewise had been "smiling" at first, then became "very solemn," and replied simply, "[I]t's a letter." McFadden admittedly pushed on, saying, "I know it's a letter[.]" prompting Fregoso to volunteer, "We're going to join a union." McFadden states she merely replied to this, "Oh, Okay[.]"²³ then asked where Stewart was, then left the area to find Stewart when Fregoso said she didn't know where he was. Cadorna, who claims to have been "following" McFadden through the office, closely echoes McFadden's version of her exchange with Fregoso, including that "Okay" was McFadden's final and only response to Fregoso's statement that the office workers intended to join the Union.

Fregoso tells a quite different story, one that is substantially corroborated by Monreal, and to a lesser extent by Ochoa. (From the accounts of all three employees, it appears that Ochoa was the most distant from the initial McFadden-Fregoso exchange, about 25 feet away.) The three employees agree that McFadden was "upset" when she approached Fregoso with the Union's letter in hand, and that it was in a sharp tone that she then demanded, "What's this?" Fregoso and Monreal agree that Fregoso replied to McFadden's question by affirming in some way that the clericals wanted a union, and that McFadden then went on

to ask, "Who else?" was "involved," and that Fregoso then mentioned (at least) Ochoa's name in reply.²⁴ All three employees agree that shortly after this, McFadden walked to (or past) Ochoa's desk, and as she drew near Ochoa, she asked in an incredulous tone, in substance, how Ochoa could want union representation when she had only been working for the Respondent for such a brief time. (From the employees' accounts, it appears that Ochoa did not reply.) Finally, Fregoso and Monreal agree that as McFadden exited the area, she said, "I'll show you what a fucking union is."²⁵

Despite the individual variations in detail or emphasis in the testimony of the three office employees, each suggested by her demeanor that she was doing her best to summon a genuine memory of the events. By contrast, McFadden's and Cadorna's versions had an unnaturally shaped and sanitized quality, suggesting nothing so much as a previously arrived at determination on their part to depict McFadden's reaction to the Union's letter as one of amused disbelief, and her brief questioning of Fregoso as merely tracing from a kind of abstract curiosity. But McFadden's own narration, *supra*, contains elements that undermine such a depiction: She implicitly admits that she assumed that a wish for union representation went hand-in-hand with the existence of employee "unhappiness," and her account likewise seems to admit that she pressed Fregoso for an explanation concerning the letter even after Fregoso uncomfortably tried to deflect her inquiry. These admissions undercut McFadden's attempts to suggest overall that she was serenely unconcerned about the Union's appearance. And they make it especially doubtful that McFadden, having chosen in the first place to confront Fregoso—and then to press her about the letter—would merely respond placidly, "Okay," and then depart the scene, once Fregoso disclosed that the employees wanted to join the Union. I give little independent weight to Cadorna's tidy corroboration of McFadden's version of events; I found many grounds to doubt Cadorna's candor or reliability con-

²⁴ Fregoso testified that she specifically mentioned her own name, as well as Ochoa's and Luz Romana's names; Monreal only recalls Ochoa's name being "mentioned" in this regard. By contrast, the more distant Ochoa did not hear her own name mentioned at this point, although she agrees with the other two employees that McFadden approached her shortly afterward and questioned her about her own support for the Union.

²⁵ Ochoa did not mention McFadden saying this, but did recall something not described by Fregoso or Monreal—that McFadden said scornfully, "Those bitches—they don't know how to cross the street by themselves, and they want a union?" Ochoa was also the only one of the three employees who recalled that McFadden scolded Fregoso that she "should have come to me" if "there were any problems," to which Ochoa says Fregoso replied, in substance, that she did not think McFadden would have responded by doing anything. Finally, Ochoa recalled that when McFadden left the clerical work area, she said to Luz Romana, who was located in a nearby office, "Luz . . . why did you sign this?" (Romana, called as the Respondent's witness, did not directly deny this; rather, her only contribution on this point was to answer "No" after she was asked by the Respondent's counsel, "Did Mrs. McFadden ever ask you if you were joining the OPEIU?") Because the elements uniquely recalled by Ochoa would not significantly aid my analysis of any complaint issue nor the scope of my recommended order and remedy, I will not decide whether Ochoa's memory of these elements was reliable enough to credit in the absence of corroboration.

²³ McFadden explained on cross-examination that she meant by this that if the employees wanted a union, "then it's okay by me."

cerning certain subjects,²⁶ and my skepticism about her testimony in this instance goes beyond suspicions that she was sanitizing her account: I remain doubtful that she was even present during the episode.²⁷

In addition to considerations of witness demeanor, my credibility resolutions concerning this incident are further influenced by my judgment, in the light of the whole record, that the Union's appearance was a decidedly unwelcome one from McFadden's perspective—in part because of its potential for siphoning away employees' attentions and energies from the high-stakes Homecare Project at a critical phase, and also in part because McFadden interpreted the Union's advent as a declaration of employee "unhappiness" with her stewardship of the operation, and experienced this as a personal insult. Both of these themes are implicit in Stewart's description of his conversation with McFadden about the Union's letter—and Fregoso's support for the Union—as he and McFadden were driving to the airport on May 5, only minutes after McFadden's confrontation with the office workers.²⁸ Moreover, as I find below, the theme that McFadden experienced the Union's appearance as a "smack in the face" was one repeated by Cadorna to Fregoso in two subsequent conversations, on May 6 and 21. But perhaps the most

persuasive illustration of these themes can be found in an incident that occurred 2 weeks later, on May 20, in which McFadden admittedly did not react with merely bemused indifference when confronted with another written request to meet collectively with the Respondent's employees. Rather, McFadden was admittedly "just disgusted" on May 20 when Fregoso handed her a letter making such a request, a letter signed by Fregoso and eight other employees, several of them staff organizers. And McFadden admittedly manifested her feelings by crumpling the employees' letter and throwing it to the floor. And she was admittedly disgusted by the employees' meeting request "because I was organizing a project and to me it was counterproductive of what was going on there. I was just disgusted."

Therefore I find it rather easy to believe that when McFadden digested the message in the Union's letter on May 5, she was put into a similarly exercised mood, for similar reasons, and that her behavior immediately thereafter with Fregoso, Monreal, and Ochoa was dominated by comparable demonstrations of disgust and resentment. In short, apart from considerations of witness demeanor, I find it independently probable on this record that McFadden said and did in the late morning of May 5 essentially what Fregoso, Monreal, and Ochoa harmoniously described.

b. McFadden Fires Ochoa

At about 5 p.m. on May 5, McFadden summoned Ochoa away from her desk and led her into a nearby vacant office.²⁹ Inside the office, McFadden handed an envelope to Ochoa, and told her she was being "terminated" because she "didn't pass a 30-day probationary period." Not replying at this point, Ochoa walked out of the office, reported to Fregoso what had just happened, then opened the envelope McFadden had given her. In it she found a paycheck, dated May 5, and a "TERMINATION OF WORK NOTICE" memorandum bearing the same date, signed by McFadden, and showing copies to Cadorna and Freeland. The memorandum said this:

I regret to inform you that your job performance has been unsatisfactory and you did not pass your 30-day probationary period.

After reading this, Ochoa caught up with McFadden, who was now in a hallway nearby, and asked McFadden why she had been fired. McFadden replied first that Ochoa "didn't pass," but when Ochoa pressed, McFadden "hesitated," and then replied that Ochoa "gave out the wrong information on the phone," adding that Ochoa had addressed "Mr. Stewart" as "Dan Stewart." Ochoa protested that she had "never been evaluated and this was a surprise to [her]." McFadden said she "didn't want to talk about it," and walked away.

3. May 6 Cadorna-Fregoso discussion

Cadorna and Fregoso agree that Fregoso came into Cadorna's office on a routine errand—delivering message slips—on the day after Ochoa was fired, and that a discussion about Fregoso's support for the Union soon emerged.

²⁹I rely on Ochoa's uncontradicted testimony for all findings about what happened during the discharge transactions described herein.

²⁶Particularly as to the events relating to Ochoa and Fregoso in May, Cadorna struck me as a witness more anxious to adhere to a company line than to the truth as she might have genuinely recalled it. She presented her testimony on direct examination in a glib and summary manner, and seemed overly eager at times to volunteer information or characterizations she apparently thought would aid the Respondent's case. By contrast, during cross-examination or examination from the bench, she often became guarded, halting, evasive, self-contradictory, or obscure when she apparently sensed a potential for injury to the Respondent's case.

²⁷None of the three office employees called by the General Counsel mentioned Cadorna's presence, even though each was closely questioned about who was and was not in the vicinity, and their memories on these points seemed vivid. In addition, Cadorna placed organizer Frank Streeter in the room, whereas the prosecution witnesses say Streeter had already departed for lunch. And Streeter himself, although called as the Respondent's witness for other purposes, was not invited to corroborate Cadorna on this point. Moreover, Cadorna's attempts to explain how she came to be present at the critical moment when McFadden confronted Fregoso about the letter were awkward, somewhat inconsistent, and at bottom, improbable.

²⁸Stewart's description of his conversations with McFadden en route to the airport emerged from my questioning of him. I formed the impression that his memory of these conversations was shaped by a wish to protect McFadden. Nevertheless, Stewart admitted that he and McFadden both voiced concerns that the Union's appearance had the potential for "unduly interfer[ing] with getting the work out," and that they agreed that "keeping people focused on the program was going to be important." (The implicit admission here is that both McFadden and Stewart saw the Union's appearance as threatening to "the program.") Stewart also recalled remarking to McFadden during their drive that McFadden must have been "shocked" that Fregoso had been involved in the Union's effort, given "the rather extraordinary things" that McFadden had done "for Josie in Josie's tenure of employment there." Stewart states that McFadden replied, "Well, you know, she's young . . . and has some maturing to do," but Stewart quickly added that McFadden "wasn't, like, fundamentally surprised or shocked or whatever." (The implicit admissions here are that Stewart, at least, saw Fregoso's support for the Union as a "shocking" gesture of ingratitude towards McFadden, and that McFadden, at least, saw Fregoso's union support as evidence of her "immaturity.")

But their versions of who said what are radically different. This is Fregoso's version, the one I will adopt:

I handed her [Cadorna] the messages, and she spoke, and she said that she had heard what happened, and from there she told me that what I had done, that I should have come to her and the co-workers [sic] to get advice from her before we had went Union. And I told her that what was done was done. And then Mrs. Cadorna proceeded to tell me that what I had done—what I had done was I got Mrs. McFadden really pissed off and that I had smacked her in the face because she had done so much for me and that—and—and then she said that . . . if it was the pay, that I—you know, we could go to Mrs. McFadden and negotiate that. And I told her the pay had nothing to do with that; it was just respect towards us. And from there it was she kept—she kept explaining to me that the Union I had chosen was no good, that OPIU [sic] was no good, that she had had representation with the previous employer she had and that Union didn't do nothing for her. And from there she's just like—she told me that the best thing for me to do was to withdraw my activities towards the Union to show Mrs. McFadden my appreciation on her hiring me. That's pretty much what I remember at the moment.

Cadorna's account turns Fregoso's on its head; she insists that Fregoso was the one who raised the subject of the Union, who volunteered her reasons for supporting the Union, and who worried aloud that she might be fired. Cadorna claims that she simply responded to Fregoso's unsolicited remarks with soothing words of encouragement—that Fregoso would not have gotten a raise recently if her job were in jeopardy, and that it was Fregoso's "right" to seek union representation. Compared to Fregoso's unprompted and natural-sounding narration, however, Cadorna's version emerged awkwardly, with false starts, self-serving digressions, belated and equivocal emendations,³⁰ and other tell-tales of improvisation and concealment. I, therefore, find Fregoso's version the more believable one.

4. The Respondent's reactions to the employees' May 20 letter requesting a meeting with McFadden

a. May 20 events

At the end of the May 20 workday, Fregoso entered an office where McFadden was talking casually with Cadorna, Freeland, and Cathryn (Cathy) Baker, an administrative assistant. Fregoso handed McFadden a typed "letter" in the form of a petition containing Fregoso's own signature and those of eight other employees, including several staff organizers, many of them with Spanish surnames.³¹ The letter,

³⁰ See especially Tr. 1248:13–22. There, after having described several times previously what had happened between her and Fregoso on May 6, Cadorna finally recalled that the expression "smack in the face" was used, but insisted, when I asked her about this, that these were "Josie's words, your Honor, not ours [sic]. . . . It was more of a term Josie used than it coming from myself."

³¹ Organizer Julio Marroquin's name headed one column of signatures and Fregoso's headed the other column. Not all of the signers' names are decipherable, but they included Latino organizers Rudy

which Fregoso and others had prepared the previous day,³² said this:

On behalf of all the staff, may we formally request for [sic] a meeting with you, if possible, tomorrow before 5 p.m.

We shall appreciate your approval in giving us your most important time.

As I have previously found, McFadden admittedly read the letter, and then disgustedly crushed it in her fist and threw it to the floor. (Moments later, she admits, someone else retrieved the crumpled missive from the floor, at Baker's suggestion.) Exactly what happened after this is not easy to sort out from the variety of sketchy and somewhat conflicting versions advanced by five witnesses.³³ From harmonious elements in the testimony of Fregoso, Cadorna, and Marroquin, I find that McFadden (followed by Fregoso and Cadorna) exited the office, where she found a larger group of employees, including Marroquin, waiting nearby.³⁴ From these same witnesses, I find that McFadden in some manner declared to the waiting group that she would not meet directly with the employees, and instructed them instead to follow the "chain of command," specifying that they should take their "concerns" to Cadorna and Freeland.

What is most in dispute about these events is whether, in thus responding, McFadden (a) complained aloud that "the fucking Mexicans [were] taking over her union" (as Fregoso uniquely recalled, and the Respondent's witnesses denied) and (b) replied vehemently, "Hell, no!" when Marroquin asked her if she intended to meet directly with the staff (something recalled by both Fregoso and Marroquin but denied by the Respondent's witnesses).³⁵ Because McFadden

Barragan and Lupe Bautista, and office worker Luz Romana. However they also included two organizers of Russian-Armenian background, Aram Agdaian, and Alina Ayuzmanyan.

³² As I have found, on May 19, the date the employee letter was prepared, the Union had also filed its petition in Case 21–RC–19216, seeking an election for the office workers.

³³ Fregoso and Marroquin were the General Counsel's witnesses; McFadden, Cadorna, and Baker were the Respondent's witnesses.

³⁴ It appears that Marroquin did not witness what went on within the office, and Baker did not witness what transpired after McFadden, Cadorna and Fregoso joined the group of employees waiting outside the office.

³⁵ This is Fregoso's version:

A. Mrs. McFadden was still very upset, and she started yelling that "These fucking Mexicans are taking over" her Union, and from there, she—she kept hollering about there was a chain of command, that we shouldn't go to her, that we were supposed to go to her—our supervisor. That was David Freeland then. And then she said—and then I said, "Well"—I'm sorry. Mr. [Agdaian] said, "[Not a]ll of those names are Mexican." And—and then that's when she started explaining to us about the chain of command. She kept talking about the chain of command, that we were supposed to go to David Freeland first, and from there she started telling us that there were two kinds of animals there, that one kind of animal was the clerical staff that opened envelopes and answered phones, and the second kind of animals were the professional staff, and that was the organizers. And from there it was like Mr. Julio Marroquin asked her was she going to meet with us or not; that was what the letter was about. And her answer was, "Hell, no." And all he said was, "Thank you," and "Have a nice night." He left.

Q. Why were you presenting that letter to her?

was admittedly disgusted by the employees' request, I have no difficulty crediting Fregoso and Marroquin that McFadden shot back with the words, "Hell, no!" when Marroquin pressed her about the requested meeting. And I don't find it necessary to determine whether, as Fregoso alone recalled, McFadden made angry or demeaning references to Mexicans, because (1) the complaint does not allege that McFadden committed any violations by her May 20 reactions to the employees' letter, no matter how she may have expressed them;³⁶ and (2) my resolution of this particular dispute would not materially affect my analysis and ultimate conclusions about any other issues in the case.³⁷

b. May 21 interviews with employee signers

Cadorna admits that on May 21 she and Freeland conducted individual interviews (Cadorna called them "one-on-one polls") with at least six signers of the May 20 letter—Fregoso, and organizers Agdaian, Barragan, Bautista, Gutierrez, and Marroquin.³⁸ Cadorna generally admits that in the course of these polling sessions these employees disclosed

A. We wanted to—to just have—just meet with her and just to have cross conversations to meet with her because the organizers was going Union also.

Marroquin agrees that McFadden replied, "Hell, no!" to his query, but he does not corroborate Fregoso's recollection that McFadden referred to "fucking Mexicans," or that she characterized clericals and organizers as "two different animals." And McFadden and Cadorna (and Baker, but see last footnote) all deny that McFadden made any such statements or references.

³⁶ Indeed, the General Counsel affirmatively disclaimed any contention that McFadden's May 20 reactions, as then being described by Fregoso, violated the Act.

³⁷ It would not influence my disposition of other issues if I were to find that McFadden did not make the anti-Mexican slurs attributed to her by Fregoso. And even if I were to resolve this dispute against the Respondent, such a resolution would be relevant to this case only insofar as it would constitute more evidence of McFadden's hostility to the employees' exercise of protected rights. (I think it is obvious as a matter of law that the employees' submission of the May 20 letter to McFadden was "concerted activit[y] for the purpose of collective bargaining or other mutual aid and protection" within the meaning of Sec. 7.) I have already found ample evidence of such animus in the statements of McFadden and Cadorna on May 5 and 6, and I will find more such animus in the statements of Cadorna to Fregoso (and to Marroquin) on May 21. Indeed, even absent those sources, McFadden's admissions about the May 20 episode alone establish that she reacted to the employees' exercise of protected rights on that date with displays of anger and disgust. Thus, even if McFadden, admittedly in a foul mood at the time, may have angrily voiced a suspicion that Mexicans were trying to "take over" her union, this feature of her reaction would be simply cumulative on the matter of animus. (At most, by drawing the difficult inference that McFadden must have intended to include Marroquin, a Salvadoran, in her denunciation of "the Mexicans" whom she suspected of taking over her union, we might infer further that the animus thus revealed influenced the Respondent's subsequent targeting of Marroquin for warning slips and eventual dismissal. This is a long stretch, and an unnecessary one; for there is independent evidence sufficient to find a prima facie case that Marroquin was discriminated against solely because of his union support and activities, and without regard to his national origin or ethnic identity.)

³⁸ Each of six-named employees had received a memo from Freeland on the morning of May 21 advising that Freeland wanted to "meet with you today [at an appointed time] to discuss any concerns you may have."

that they had joined the Union, or supported it, and gave their various reasons for doing so. Moreover, sketchy notes taken by Cadorna or Freeland in each interview tend to focus on such disclosures.³⁹ However, Cadorna avers that the purpose of the meetings was not to gain intelligence about who supported the Union, or about the depth or strength of that support, but simply to find out what the employees' "individual issues" were, so that she and Freeland could put together an "agenda" for an "official meeting" between McFadden and "the staff" to be "scheduled" later.⁴⁰ And Cadorna denies that she or Freeland "sed the occasion of these "polling" sessions to interrogate anyone concerning their attitudes towards the Union, or to threaten them.

In all the known surrounding circumstances, I strongly doubt Cadorna's explanations for these management "polling" activities.⁴¹ But I will not dwell on this point, nor on the question whether such pollings were themselves unlawful interrogations, for the complaint makes no attack on the fact that the Respondent conducted these sessions, nor does it allege that unlawful interrogations occurred within these sessions. Rather, the pertinent counts in the complaint allege only that Cadorna and Freeland made unlawful "solicitations" and "threats" during the polling sessions.⁴²

To support these counts, the General Counsel relies chiefly on Fregoso's testimony about statements made by Cadorna and Freeland during their meeting with her, and to a lesser extent on a fragment of Marroquin's descriptions of his separate meeting with those supervisors. This is how Fregoso described her meeting with Cadorna and Freeland:

A. Mr. Freeland spoke first. He asked me—he told me that—what we had—they had scheduled this meeting to know what was my concerns, and then from there Wilma Cadorna spoke and asked me what was my concerns. And I told her that my concerns were that

³⁹ See R. Exh. 28.

⁴⁰ Cadorna repeatedly used such terms in describing the purpose of the "polling." E.g., Tr. 827:14–17; 829:2–6. And see Tr. 829:13 through 831:8, in which Cadorna first explains that the reason for individual polling rather than a "joint meeting" (meaning, in context, a gathering of the clericals and organizers together in a meeting) was that "[w]e didn't want to . . . make it appear that was the meeting the staff was requesting." When I invited Cadorna to clarify what she meant by this latter statement, she advanced ever more uncomfortable and implausible explanations.

⁴¹ So far as this record shows, what Cadorna and Freeland learned from their polling activities was never used to develop an "agenda" for a supposed eventual "meeting" between McFadden and the "staff" that supposedly was to be "scheduled" soon thereafter. Indeed, the record contains no indication that any such meeting ever took place.

⁴² Thus, the complaint alleges that on May 21, Cadorna "solicited employees to withdraw their support for the Union by telling employees they should cease their union activities," and "threatened to discharge" employees involved in union activities, and "threatened . . . unspecified reprisals if they selected the Union[.]" and "informed employees that it would be futile for them to select the Union as their bargaining representative," and "solicited employees to resign from employment if they selected the Union." And as to Freeland, the complaint alleges that on May 21, he likewise "threatened the employees with unspecified reprisals if they selected the Union."

people around there didn't get no respect and people was treated, you know, very unfairly.

And from there she started explaining to me again how bad OPIU was, and she started explaining about—about I had started something against Mrs. McFadden or I had done something that got her really pissed off, and that again she told me that I had smacked her in the face, and—and then from there, she told me that—that she had helped me in many ways for Mrs. McFadden not to terminated [sic] me.

Q. That Wilma had helped you in many ways?

A. Yes. And then she—she started saying that the best thing for me to do is just stop that, stop doing all of that activity. And then she also said that—that I had started all this shit and that I should end it. And then she explained to me that if she—she had—she needed a union to represent her and she worked for a union, that she would quit.

And I asked her that she's giving me some advice for me to quit, and she said that was what she would do.

And from there, she—and David Freeland told me that—that he was going to discipline me his way, and another incident he explained that he had tried disciplining somebody at the office, one of the staff, and that they got defensive, and I explained to him that it didn't have nothing to do with me and that did he have any problems with me, and he paused, and he said, "No."

And from there, they explained to me that—

Q. Wait, who's "they"? Who spoke?

A. Wilma spoke, and she explained to me that by me having a union it wasn't going to be any good, if they wanted to fire me, they couldn't help me in any way if they wanted to fire me. And then she also told me that what was going to happen was that they were going to be the bosses and we were going to be the employees, and if I needed like time off to take my little girl to the doctor or—or bring her from school or—I had to give them like a week's notice before I could get that—that time.

And then from there she—she explained to me that—that I needed to give them time before they could give me that time off, and that's pretty much what I recall at the moment.

Q. Was there anything else—anything else about that conversation?

A. No. Just at the end she told me—Wilma Cadorna said—you know, I told her that—I'm sorry. I spoke, and I said it was—you know, if she wanted me to retrieve my activities, that I wasn't going to do it, and then she—then she spoke, Wilma Cadorna, and she said, "Well," she said something like, "We'll see what happens," or something like that. I don't—I can't remember her exact words. And then from there I just walked out of the room.

Q. Did she say anything to you about advice?

A. She was just giving me the advice that if—that if—about that my advice was—my advice—she gave me some advice about me retrieving all of that, that it's

best for me to leave it alone besides the advice she gave me about the Union, you know, that—that if she worked for a union and if she needed a union to represent her, that she would quit. That's the advice she gave to me.

Q. Now, is there anything else about that conversation that you remember at this time?

A. No.

Cadorna's version again inverts Fregoso's: Cadorna claimed that Fregoso voluntarily brought up all union-related matters, including her fear that she might be in trouble with McFadden and that her job might be in jeopardy, but Cadorna denied that she or Freeland said anything to promote that fear, or otherwise threatened Fregoso concerning her union activities. Again, for reasons already noted, I give scant weight to Cadorna's recollections, and find Fregoso's version of the event the more credible one.

Marroquin, describing his own meeting on May 21 with Cadorna and Freeland, quotes Cadorna as explaining to him at the outset that she wanted to find out what was behind the "uprising that was happening in the office," and wanted to "know what [Marroquin's] thoughts were." Marroquin testified that he replied that he had "signed up a union card for OPIU [sic]," and that his "intentions were to help to organize bargaining unit at Local 434B." Marroquin's testimony suggests further that the meeting was held not just to gain insights about the "uprising," but also to convey the message that management would retaliate by tightening-up enforcement of the rules. Thus, Marroquin recalled that Cadorna stated that "the administration wasn't going to oppose our organizing efforts but she [Cadorna, apparently] thought it was wrong because Mrs. McFadden treat[ed] us as family members, . . . and that by trying to organize the bargaining unit at the Local, we were forcing Mrs. McFadden to treat us as employees rather than as member[s] of a family, and by doing so, they were going to enforce all the administrative rules." Although Cadorna generally denied having told anyone that the Respondent intended to enforce the rules more strictly in response to the employees' pursuit of union representation, I credit Marroquin in this latter regard.⁴³ Moreover, because Cadorna has not distinctly contradicted the balance of Marroquin's seemingly candid descriptions of this meeting, I rely on his account to find that in this meeting, Marroquin clearly put his supervisors on notice that he had signed a card for the Union and intended to assist in the Union's organizing efforts.

⁴³ Marroquin sometimes showed a tendency to dramatize and exaggerate, and when asked to quote others, he sometimes used characterizations that appeared to be grounded in his subjective interpretations, and not his actual memory of what he heard. My crediting of Marroquin over Cadorna as to the threat to more strictly enforce the rules has less to do with my confidence in Marroquin's account than it does with two other considerations: The first is Freeland's absence from the witness stand, which invites the inference that he would not have supported Cadorna in her denial that she made such a threat; the second is the fact that Fregoso credibly reported a similar threat by Cadorna, albeit one more limited in scope, and tailored to Fregoso's unique child-care needs.

*B. Analyses, Supplemental Findings, and Conclusions
of Law Concerning Events Through May 21*

1. The 8(a)(1) counts

Based on the foregoing findings, I conclude as a matter of law that in each of the itemized cases below, the Respondent interfered with, restrained, and coerced employees in the exercise of their Section 7 rights, and thereby violated 8(a)(1)'s proscriptions.⁴⁴

a. On May 5, McFadden unlawfully interrogated employees when she (1) sternly confronted and then questioned Fregoso about her own and other employees' "involve[ment]" with the Union, and (2) then scornfully questioned how Ochoa could want a Union, considering her brief tenure on the job.⁴⁵ In addition, McFadden's angry vow upon exiting the area—to "show" her listeners "what a fucking union is"—reasonably and predictably would have been taken by the workers who heard it as a threat of some form of retaliation against them for having sought representation by

⁴⁴ While the violations I find below are harmonious with many of the complaint's characterizations of the Respondent's conduct through May 21, I do not necessarily adopt the complaint's characterizations of that conduct, nor the General Counsel's apparent underlying theories of violation. I specifically reject as not factually well supported any claim that the Respondent's conduct through May 21 involved unlawful attempts by the Respondent to "create the impression of surveillance" of employees' union activities. In addition, I reject as a matter of law any suggestion in the complaint that remarks by McFadden and/or Cadorna which merely "disparaged" the Union had independent character as violations of Sec. 8(a)(1). Finally, as to the single count in the complaint attacking Freeland's conduct on May 21, the only remarks that Fregoso attributed to Freeland struck me as too vague or equivocal in import to sustain the complaint's characterization of them as "threat[s of] . . . unspecified reprisals" if the employees "selected the Union." Accordingly, I would dismiss the count alleging that Freeland's statements on May 21 violated Sec. 8(a)(1).

⁴⁵ In this regard, it is irrelevant that McFadden's "question" to Ochoa was arguably rhetorical in a technical sense, and equally so that Ochoa did not reply. What seems clear enough is that in thus confronting Ochoa, McFadden was implicitly asking her to account for her support for the Union. Moreover, I note that neither Fregoso nor Ochoa were "open" supporters of the Union at the time McFadden questioned those employees. Cf. *Rossmore House*, 269 NLRB 1176 (1984), *enfd. sub nom. Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985), holding generally that an employer's questioning of an "open and active union supporter" is not, per se, an unlawful interrogation, and that the legality of such questioning depends on all the surrounding circumstances. See also *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985), where the Board majority more expansively applied the "totality of circumstances" standard announced in *Rossmore House* even to situations where employees being questioned were not "open and active union supporters." *Id.* Therefore, I have considered all of the circumstances, including the "reality of the workplace," (*Id.*), in reaching my conclusion that McFadden's questioning of Fregoso and Ochoa amounted to unlawfully coercive interrogation. In this regard, I found it influential that McFadden, the Respondent's chief executive, was confrontative and hostile in tone and manner in her questioning of the clearly uncomfortable Fregoso and the mute Ochoa, and that she uttered an independently unlawful threat in her parting tirade, as I shall find next.

the Union, and therefore her vow independently violated Section 8(a)(1).

b. On May 6, Cadorna implicitly threatened that Fregoso's job was in jeopardy because of her union activities by suggesting overall that Fregoso was in trouble with McFadden for having begun the Union effort,⁴⁶ and by telling her that the only way she could square things with McFadden would be by "withdrawing [her] activities towards the Union to show Mrs. McFadden [her] appreciation." In addition, Cadorna coercively implied a promise of benefit for forgoing union representation when she suggested to Fregoso that "if it was the pay, that [Cadorna and Fregoso] could go to Mrs. McFadden and negotiate that."

c. On May 21, Cadorna echoed and amplified her earlier unlawful threats to Fregoso's job when she, (1) again warned Fregoso that McFadden was "pissed off" at Fregoso, and had experienced Fregoso's union activities as a "smack in the face," and (2) suggested that it was only through Cadorna's interventions that McFadden had been dissuaded from "terminat[ing]" Fregoso, and (3) even more urgently pressed Fregoso, as the one who had "started this shit," to "end" it, and (4) "advised" Fregoso, in substance, that employees who worked for a union had no business wanting independent union representation, and that if Fregoso believed otherwise, she should just "quit" her employment with the Respondent,⁴⁷ and (5) effectively told Fregoso that if the Union became the employees' representative, a necessary consequence for Fregoso would be that, contrary to more lenient practices in the past, Fregoso would not be allowed time off, ad hoc, to handle unforeseen child care problems, but would be required to give a week's "notice" before she could take such leave.

d. On May 21, Cadorna similarly threatened Marroquin by telling him that the employees' "uprising" would cause the Respondent to become more strict about "enforc[ing] all the administrative rules."

2. The 8(a)(3) count; the termination of Ochoa

a. *Introduction*

Because the Respondent's motives for firing Ochoa are necessarily called into question by the complaint, her dismissal invites the "causation" analysis prescribed in *Wright Line*,⁴⁸ where the Board declared that "henceforth," it would,

⁴⁶ Thus, Cadorna told Fregoso that she "should have [come] to [Cadorna] . . . to get advice from her before [they] . . . went Union, and warned Fregoso that "what [Fregoso] had done . . . got Mrs. McFadden really pissed off" and that Fregoso had "smacked McFadden in the face because [McFadden] had done so much for [Fregoso]."

⁴⁷ Here, following the rationale of *Rolligon Corp.*, 254 NLRB 22 (1981), I find that Cadorna's remarks violated Sec. 8(a)(1) because they "convey[ed] the clear message that support for the Union and continued employment by Respondent are incompatible." *Id.*

⁴⁸ 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).

... employ the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.⁴⁹

My findings about what happened on May 5 alone contain rather obvious indicators that union-hostile motives informed the decision to fire Ochoa—a decision, incidentally, that I am persuaded was made and implemented entirely by McFadden, despite Cadorna's implausible attempts to distance McFadden from the action.⁵⁰ Thus, I have found that McFadden learned of Ochoa's support for the Union when she coercively questioned Fregoso in the late morning of May 5, then confronted Ochoa and disparagingly questioned how an employee with as little time on the job as she had could favor union representation, then vowed to “show” her listeners “what a fucking union is,” and then fired Ochoa only hours later. In short, the General Counsel has established by a preponderance of the credible evidence in this record the traditional elements of a prima facie case of unlawful discrimination, “knowledge,” “animus,” and (extraordinarily close) “timing.” And on these facts, we might presume not just that Ochoa's support for the Union tainted McFadden's decision to fire her, but that firing Ochoa was more specifically intended by McFadden as an object lesson calculated to chill support for the Union among the remaining employees, indeed, as a fulfillment of her angry vow, made only hours earlier, to “show” employees what the consequences of unionization could be.

Under *Wright Line*, therefore, it clearly fell to the Respondent to “demonstrate” that notwithstanding these indications of unlawful motive, Ochoa would have been fired on May 5 for “innocent” reasons entirely unrelated to her own support for the Union, or to the Union support manifested by her fellow office workers.

⁴⁹Id. at 1089. See also *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), affg. *Wright Line* analysis.

⁵⁰McFadden effectively admitted that she was herself the author of Ochoa's dismissal, for she testified that she decided during the May 5 morning meeting with Stewart, et al., that Ochoa must go, and then communicated this to Cadorna (“If you don't fire her, I will.”) during the meeting, and before she discovered the Union's letter. By contrast, Cadorna mentioned no such instruction from McFadden; Cadorna claimed instead that she independently reached the judgment during the meeting with Stewart that Ochoa must go, and that in a later afternoon call from her physician's office, she made a “formal recommendation” to that effect to Freeland, subject to McFadden's “concurrence.” Cadorna's attempt to reconcile her admitted absence from the office for several hours after the meeting with Stewart with her claim that she was nevertheless a prime mover in Ochoa's dismissal evokes the famously awkward and improbable “stretch” demonstrated to the world in Watergate times by another executive assistant seeking to protect her boss. Despite Cadorna's apparent attempt to distance McFadden from the discharge decision, I have no doubt that McFadden herself was correct about who authored the decision. But I have the most profound doubt that McFadden truthfully described why, or when she made the decision.

As we shall see, the Respondent sought to establish, chiefly through McFadden and Cadorna, that the decision to fire Ochoa, (a) followed a growing dissatisfaction with her work over the brief period of her employment, (b) immediately followed a series of last-straw infractions committed by Ochoa on the morning of May 5, and in fact, (c) the decision to fire Ochoa was reached before McFadden opened and read the Union's letter seeking recognition and bargaining (although at most only an hour before McFadden's discovery of the Union's letter, if I were to take either McFadden or Cadorna seriously on these points of the timing of the “decision,” which I will not do). We shall see also how hard it is to pin down the specific reasons the Respondent relies on to justify firing Ochoa. In large part this is because the Respondent's accusations against Ochoa have shifted over time, and not just in focus or emphasis, but in their very content. Moreover, the Respondent's witnesses often failed to corroborate one another, and at times they even contradicted themselves or one another as to exactly what it was that Ochoa was supposedly doing wrong throughout her employment, and exactly what it was that supposedly constituted Ochoa's last-straw misconduct on the morning of May 5. Finally, as we shall see, Ochoa had never been written up or otherwise warned in any distinct way that her performance was not up to par, and I will find unpersuasive the evidence offered by the Respondent to show that Ochoa had been repeatedly “counseled with” over her various alleged shortcomings. And it is mainly for the reasons I have just summarized that the Respondent has failed to “demonstrate” to my satisfaction that, absent the Union's appearance, Ochoa would have been fired on May 5. Indeed, as I view it, the Respondent's defense as to Ochoa was so permeated overall with the odor of pretext that its proof tended mostly to reinforce the prosecution's case.⁵¹

In my elaboration of these points below, I will first dispose of a variety of claims and charges made by the Respondent against Ochoa which I judge were either abandoned by the Respondent or were so lacking in substantial proof as to border on the frivolous. I will then return to two charges (chronically bad message-taking; last-straw message mistakes on May 5) as to which the Respondent offered somewhat more substantial evidence, but still not near enough in my judgment to carry its *Wright Line* burden.

b. Abandoned and/or insubstantial charges

I begin with the reasons that McFadden wrote down at the end of the day on May 5, when she dismissed Ochoa. I recall that she declared generally in Ochoa's Termination Notice that Ochoa's “job performance has been unsatisfactory,” and that Ochoa “did not pass [her] 30-day probationary period.” The “unsatisfactory” accusation was, of course, conclusory, and the particulars eventually advanced by the Respondent remain to be considered. But I think it is worth pausing here to discuss the implications of McFadden's curious references to Ochoa's supposed “30-day probationary period.”

Ochoa's “Employee Agreement,” which she signed when she was hired on April 5, said this in a section labeled, “Probation Period”:

⁵¹*Shattuck Denn Mining Co. v. NLRB*, 362 F.2d 466 (9th Cir. 1966).

The standard probation period is six (6) months; You will be evaluated by your supervisor for the first three (3) months and/or as needed. You will be evaluated based on your ability to perform the job requirements specified on this memo.⁵²

Clearly, the “standard probationary period” contemplated by Ochoa’s Employee Agreement cannot be harmonized with McFadden’s assertions that Ochoa operated under a “30-day” probationary period. In fact, Ochoa’s tenure had been so brief when McFadden fired her that she was not even due under the employee agreement for a scheduled first “evaluation.” It is doubly curious that the Respondent continues to insist falsely on brief that Ochoa “was subject to a 30 day probationary period,” and more than merely curious that briefing counsel has compounded this misrepresentation by citing phantom sources in the record for it.⁵³ Neither are these curiosities evaporated by the Respondent’s backpedaling suggestion on brief that the actual duration of Ochoa’s probationary period is in any case irrelevant, at least to the Respondent’s defense.⁵⁴

Lacking any explanation for these curiosities, I infer from McFadden’s repeated references on May 5 to a “30-day” probationary period that she was trying, however clumsily, to rationalize the extraordinary timing of Ochoa’s dismissal in terms of an understandable business need to act promptly against Ochoa, i.e., when she had nearly completed her “probationary” period, a time when an employer might reasonably pause to review a probationer’s work history, and might be expected to resolve any doubts about the probationer in favor of termination, lest the probationer soon acquire a more insulated status. (Under this interpretation, McFadden merely seized on the fact that Ochoa was approaching her 30th day on the job, then falsely equated this tenure with Ochoa’s nearly having completed her “probationary period.”) But Ochoa was not by any stretch nearing the end of her probationary period. And therefore McFadden’s seeming attempt to impart the false appearance of business “regularity” to the timing of her dismissal of Ochoa may be seen also as an attempt to obscure the fact that Ochoa’s dismissal was,

in the light of the employee agreement’s terms, and the Respondent’s more general disciplinary practices, a distinctly irregular action—a summary dismissal without prior evaluation or warning.⁵⁵

I recall next that when Ochoa, after receiving her termination notice, caught up with McFadden in the hallway and pressed McFadden for specifics, McFadden accused Ochoa of “[giving] out the wrong information on the phone,” and further criticized her for referring to “Mr. Stewart” as “Dan Stewart.” As to the criticism that Ochoa had given out “wrong information on the phone,” McFadden was never directly asked what she had meant by this. (Indeed, she was not asked to offer her own version of her remarks to Ochoa during the discharge transactions described by Ochoa.) However, in reciting a more general litany of “problems” she had experienced with Ochoa, McFadden sketchily recalled one episode that might arguably fit the “wrong information” category: “[A]pproximately the second week after Mrs. Ochoa was hired,” McFadden testified, certain members of the Respondent’s executive board “complained” to McFadden, in Cadorna’s presence, “that Mrs. Ochoa just would not give them the correct information they were seeking.” And this caused McFadden, she says, to instruct Cadorna to “talk with Ms. Ochoa and explain the importance of the service . . . especially to the board members because they frequently called for more business than just, you know, just client business.” McFadden never was invited to particularize in what way Ochoa had failed to give “correct information” to executive board members. Cadorna fails to corroborate any “wrong information” element in McFadden’s wispy account, and Ochoa credibly denied ever having been “talked with” about that subject by any of her supervisors. I find that the Respondent did not reliably establish that the “wrong information on the phone” charge had any basis in fact, much less did it persuade me that this supposed “problem” with Ochoa in any way figured in McFadden’s thinking in deciding to fire her. Indeed, I am inclined to view McFadden’s voicing of this “wrong information” charge on May 5 as

⁵² In fact, Ochoa’s Employee Agreement did not “specify” any “job requirements,” it merely identified her “Position” as “Clerk.”

⁵³ At p. 17 of its brief, the Respondent cites two alleged record sources for the claim that Ochoa was “subject to a 30 day probationary period,” Ochoa’s Employee Agreement, pertinently quoted above, and Cadorna’s testimony at Tr. 769 and 779. The Respondent does not explain how the Employee Agreement could be construed to support this claim, and it seems plain to me that the agreement flatly contradicts it. I am equally mystified by the Respondent’s citation to Cadorna’s testimony, for after reviewing the cited passages, I find nothing that even remotely implies that Ochoa was “subject to a 30 day probationary period,” nor even any indication that Cadorna believed that this was so.

⁵⁴ The Respondent argues in the alternative (id.), in substance, that whatever was the exact duration of Ochoa’s nominal probationary period, she enjoyed no guarantee of employment for the duration of such a period. But this is trivially true; no one suggests that the employee agreement operated as a bar to firing Ochoa within her probationary period (nor even as a bar to firing her after she completed her probationary period, for that matter). In this sense, the Respondent is correct that the actual duration of Ochoa’s probationary status is irrelevant. But recognizing that this is so, I am left wondering why the Respondent went to such lengths in the first place to try to depict Ochoa’s probationary status as lasting only “30 days.”

⁵⁵ It is undisputed, as Ochoa credibly testified, that Ochoa had never received anything resembling an “evaluation.” This is not surprising, given that, under the employee agreement, she was not scheduled to receive one until the end of her third month on the job, and would not receive one prematurely unless her supervisor judged that she “needed” one, a judgment, apparently, that neither McFadden, nor Cadorna, nor Freeland ever reached. Moreover, it is undisputed that Ochoa had never received any written critiques of any kind before she was fired, even though the record contains a huge amount of evidence showing that the issuance of written corrective or disciplinary memos was the norm when McFadden or Cadorna or Freeland were displeased with an employee’s performance. (See, e.g., Jt. Exh. 1, subexhibit “A,” a written stipulation summarizing more than 45 such memos issued to 16 employees of the Respondent in the period November 15, 1990, through December 8, 1993, the date the exhibit was received into evidence. See also Cadorna’s testimony at Tr. 768:16 through 769, suggesting in the aggregate that her normal practice is to follow a progressive system of discipline, beginning with “verbal counseling,” and then a “write-up” if “the same kind of mistakes occur,” and then, “if an individual continues to commit the same error . . . [this] would then lead to a termination of that individual.”) We may thus infer that nothing in Ochoa’s performance before May 5 had caused McFadden or Cadorna or Freeland to feel any “need” to “evaluate” her, much less “warn” her that one or more aspects of her performance was unsatisfactory.

further evidence that McFadden was casting about recklessly that day to improvise a justification for her decision. And I see McFadden's latter charge against Ochoa—that Ochoa violated protocol by uttering Stewart's first name, instead of using the address, "Mister"—in a similar light, for this was an accusation that the Respondent never thereafter invoked or tried to explain.⁵⁶

So far as this record shows, the next time the Respondent sought to justify why it had fired Ochoa was some 2 months after Ochoa's termination, on July 1, when it filed its answer to the original complaint. There, in its "Second Affirmative Defense," the Respondent averred generally that it "terminated . . . Ochoa during her probationary period[,] as she evidenced an inability to satisfactorily perform her duties and responsibilities." This generalized defense was further particularized in two succeeding defenses. Thus, in its "Third" affirmative defense, the Respondent averred for the first time that Ochoa "repeatedly failed to secure correct telephone messages and routed messages to the wrong recipient, creating chaos and confusion." And in its "Fourth" defense, the Respondent charged, again for the first time, that Ochoa "failed to conduct herself in a professional manner by repeatedly yelling at people and causing other disturbances."

As to the "Third" defense, I will find that the Respondent presented substantial evidence that many of Ochoa's message-slips were "incomplete," in the sense that they did not always include information called-for on the message slip forms she used. But Ochoa's supposed "errors" in this regard were never shown by the Respondent to have "creat[ed]" anything resembling "chaos and confusion."⁵⁷ Therefore, the latter claim may be dismissed immediately as unfounded puffery. The accusation set forth as the Respondent's "Fourth" defense—that Ochoa was "repeatedly yelling at people and causing other disturbances"—was equally bombastic and groundless; in fact, the Respondent made no attempt whatsoever to prove it. I thus treat it as simply one more red herring, suggesting nothing so much as continuing improvisation and tinkering with defenses by the Respondent even as late as 2 months after Ochoa's dismissal. And as I

discuss next, this experimentation with defenses appears to have continued well into the trial, as the Respondent introduced yet additional charges against Ochoa, none of them related to either of the more particular defenses the Respondent had averred in its July 1 answer, and none of them reliably supported in any case.

At trial on March 8, 1994, McFadden was invited to describe two incidents. In the first, which McFadden recalled happening "like 2 or 3 days after the lady [Ochoa] was hired," McFadden claims that she saw Ochoa leaning over her desk with her head in her hands, ignoring a ringing phone. McFadden testified that she was disturbed enough by this that she sought out Freeland and Cadorna (but did not say anything to Ochoa directly), and complained about the incident to the supervisors, and received their assurances that "they would speak to" Ochoa. (Called at the rebuttal stage, Ochoa credibly denied that she ever did what McFadden described. Cadorna was never invited to corroborate McFadden,⁵⁸ and of course, Freeland did not testify.⁵⁹ The Respondent offered no evidence that anyone ever did, in fact, "speak to" Ochoa about the supposed "head-in-hands" incident.) In the second incident, McFadden recalled that in "the second week of [Ochoa's] employment," Ochoa had refused McFadden's request that Ochoa type up a handwritten memo McFadden had prepared. This incident, McFadden elaborated, caused her again to complain to both Cadorna and Freeland, and to direct them "to please advise this young lady, that she must do typing." On rebuttal, Ochoa specifically and credibly denied this claim, and further denied ever having been asked by any of her supervisors to do any typing. Cadorna offered no corroboration to McFadden's testimony in this respect. Neither did the Respondent try to prove that Cadorna or Freeland had ever gotten back to Ochoa with the message McFadden claims she instructed them to deliver to Ochoa.

Considering all the circumstances, I am persuaded that McFadden either invented these episodes entirely or dredged them up belatedly from a dim memory of some long-overlooked encounters with Ochoa, and then exaggerated them mightily when she took the witness stand. It is suspicious enough that these alleged episodes were never previously invoked by the Respondent in its various explanations for Ochoa's termination; it is doubly suspicious that Cadorna (and Freeland) did not corroborate McFadden, and trebly so that Ochoa's supposedly insubordinate behavior towards McFadden during the alleged "typing" episode was never documented in some form of memorandum or writeup to Ochoa. Once again, I see the Respondent's belated invocation of these episodes as examples of rather desperate mud-

⁵⁶ The Respondent's brief sets forth a rather formidable catalogue of Ochoa's alleged sins, but it nowhere cites her failure to refer to Stewart as "Mr. Stewart." Moreover, even though Ochoa admits to having said, "Dan Stewart" when paging Stewart over the office public address system, she credibly testified that she had never been told not to use that appellation. (Indeed, the Respondent made no effort to establish that Ochoa had been instructed only to use, "Mr. Stewart" when calling for Stewart; neither does Stewart's testimony suggest that he was in any way offended by being paged as "Dan Stewart.") Again, it appears that although this was one of only two specifics against Ochoa uttered by McFadden on May 5, the Respondent has simply abandoned this attack.

⁵⁷ Cadorna uniquely testified that "around the third week of April," several unnamed "organizers" had "submitted complaints" about the "accuracy" of phone messages, and that she therefore issued a "general directive" to both Fregoso and Ochoa that "they need to take messages accurately." Fregoso and Ochoa both credibly denied having received such a "directive" from Cadorna, and no organizer was presented to corroborate Cadorna concerning such complaints. I do not believe Cadorna in this regard. But I further note that she never sought to attribute to Ochoa the "inaccuracies" about which the organizers had supposedly complained, much less would her testimony support the claim that Ochoa's inaccuracies "creat[ed] chaos and confusion."

⁵⁸ Cadorna independently recalled an incident where she claims to have noticed Ochoa sitting by as the phone continued to ring, following which she says she advised Ochoa that she should not let the phone ring more than three times without answering it. However, Cadorna nowhere mentions any involvement by McFadden in these transactions. In any case, I am more persuaded by Ochoa's denial of any occurrences such as those described by either McFadden or Cadorna.

⁵⁹ Without repeating the point hereafter, I will draw the appropriate adverse inferences from the Respondent's failure to call Freeland to testify about the many disputed transactions concerning Ochoa in which he was claimed by McFadden or Cadorna to have been directly involved, including the events of May 5.

slinging, apparently done in the hope that something might “stick” to Ochoa, or at least in the hope that the sheer volume of mud would obscure the view.

c. Less frivolous, but still unpersuasive charges

The “Third” defense pleaded in the Respondent’s answer, as it was developed by the Respondent in the trial, involves two distinct subcharges against Ochoa—first, that throughout her employment, Ochoa failed to fill out incoming telephone call message slips properly, and second, that on the day she was fired, she had in various ways mishandled phone calls during Stewart’s meeting with McFadden, Cadorna, and Freeland, the meeting which immediately preceded McFadden’s discovery of the Union’s letter. These alleged May 5 “misroutings” of calls became, in Cadorna’s words, “the icing on the cake” in the “decision” to fire Ochoa.

(1) Phone message errors

The claim that Ochoa chronically failed to record phone messages properly was the one the Respondent spent the most time on, and most of this time was spent introducing and then explicating a 97-page booklet of duplicate copies of phone message slips taken by Ochoa. This booklet shows that Ochoa, in her backup receptionist role, took approximately 384 phone messages in her 23 days on the job, averaging roughly 17 messages a day. The booklet shows facially that Ochoa had in many cases failed to fill out her message slips “completely,” i.e., had failed to make all the entries called for on the printed message slips. These included such arguably serious errors as failing to record the date of the call, or the name of the person being called, or the caller’s name, or the caller’s return phone number, or the caller’s “message.”⁶⁰ In a smaller number of cases, she misrecorded the dates of the call, for example, by noting the date of several calls she took on April 5, her first day on the job, as

⁶⁰ I will find below that the number of such arguable “errors” or “omissions” to be found in Ochoa’s message slip booklet was unknown to the Respondent’s agents when McFadden fired her. But I stress here that such “mistakes,” although they are numerous, do not even persuade me that Ochoa was “negligent” in her message-taking role, as distinguished from being unable to extract from callers all of the information called for on the message slip form. For example, as Ochoa explained, some callers might simply want to talk to an “organizer,” without knowing or identifying a particular organizer, and this would explain why she might not put a name in the “For” space on the message form. In addition, it may be presumed that in at least some cases where Ochoa failed to put the caller’s name on the message form, this was because the caller did not want to leave a name, but only a phone number, or simply a social security number. (Here, I recall Cadorna’s testimony to the effect that some of the Respondent’s members enjoy, at best, a precarious immigration status, and that others work under more than one name and social security number.) In other cases, a not fully completed message slip might have been traceable to the fact that the caller spoke a language other than English or Spanish. Moreover, aside from the predictable problems uniquely associated with the Respondent’s operation, I regard it as a generally noticeable fact of business life that even the most conscientious receptionist cannot always persuade a caller to provide every bit of information nominally called for on a message slip form. Thus, we know that some callers, for a variety of reasons, will resist such inquiries, and will insist on leaving only a skeletal message, for example, “Just tell him that ‘Fred’ called; he knows who I am and how to reach me.”

“3/5/93.” Elaborating on this documentary proof, the Respondent invited both McFadden and Cadorna to affirm, generally, that good message-taking was “important” to the Respondent’s effectiveness, a point which I accept for all further purposes. And Cadorna was further invited on the witness stand to peruse Ochoa’s message booklet, and to point out and comment on any serious flaws she might detect, a task she undertook with a zeal that at times clearly caused her to overreach.⁶¹

To deal with such proof, the General Counsel introduced an equally large booklet of duplicates of phone messages taken during the same period by Fregoso (showing that Fregoso, too, had on occasion committed similar errors), and yet another such booklet of messages recorded by Ochoa’s post-May 5 successor, Julietta Mills, during her own first month on the job (showing that Mills, too, had committed “mistakes” of the type singled-out by the Respondent for criticism in Ochoa’s booklet, without ever having been warned about them, much less fired for them). Responding to these showings on brief, the Respondent concedes that Fregoso also committed message-slip “mistakes,” but avers that, “as a percentage of the huge volume of calls Fregos[o] takes everyday as the primary receptionist, Fregos[o]’s mistakes are de minimis when compared with Ochoa’s.”⁶² Similarly, the Respondent “admits that Mills’ messages also have errors in them,” but avers further that “Mills’ mistakes are different and less significant than Ochoa’s.”⁶³ And to support these summary claims, the Respondent has included in its brief a formidable chart of “Message Errors.” This tabulation purports to categorize, quantify, and compare all “errors” found in the message booklets of Ochoa, Fregoso, and Mills, and to assign to each receptionist an error-rate “percentage” in each error category (i.e., “the percentage representing the number of errors of each type relative to the approximate number of messages in each [booklet] volume.”⁶⁴) And from this “Message Error” chart, the Respondent summarily makes some rather murky additional claims, as follows:

Although Mills had more missing messages than Ochoa, taken in their entirety [sic], it is clear that Ochoa excluded much more information than Mills, and definitely more than Fregos[o]. . . . [I]t is abundantly clear that Ochoa’s message taking skills were far from acceptable when compared with either Mills or Fregos[o].

⁶¹ In one striking instance, while reviewing Ochoa’s message copies on the witness stand, Cadorna seized on a misspelling of a caller’s name as worthy of criticism, only to concede, grudgingly, that she was just being “nit-picky.” (Tr. 801:2–4.) And in another case, when her attention was called to a message slip to herself that identified the caller only as “Claudia,” and contained no return phone number, Cadorna first admitted unguardedly that she knew that “Claudia” referred “obviously” to a certain “Claudia Johnson,” whose telephone number Cadorna admittedly knew. But then, forgetting this admission, Cadorna still tried to portray the message slip as seriously flawed because “there’s many Claudias that I know.” Tr. 795:21–796:9.

⁶² R. Br. 19.

⁶³ Id. at 20.

⁶⁴ Id. at 20–21.

Also, although Mills made mistakes, there is the possibility of “sabotage” by union supporters in the initial training of Mills. Mills was trained by Josie Fregos[o], an avowed union supporter. . . . Thus, while some of Mill’s [sic] messages are unsatisfactory, there remains doubt as to their cause.⁶⁵

The Respondent’s suggestion that union-inspired “sabotage” tainted Mills’ work product is ludicrously speculative on this record, and deserves no further attention. The Respondent’s chart of Ochoa’s comparative “Message Error” rates, compiled from its perusals of the three booklets, strikes me as largely beside the point, even if the calculations and other data in the chart might be roughly substantiated by the data in the booklets.⁶⁶ This is because the Respondent’s attempt to meet its *Wright Line* burden by relying on the errors it has discovered in Ochoa’s booklet suffers from more fundamental problems:

First, the Respondent made no showing that any of its agents had ever examined any of these booklets before Ochoa was fired, much less a showing that anyone had ever made the kinds of “error rate” comparisons now to be found in the Respondent’s “Message Error” chart. This alone justifies the inference that the “error rate” arguably revealed by Ochoa’s booklet was quite unknown to McFadden or Cadorna when the decision to dismiss her was reached. This inference is strengthened by the fact that McFadden made no mention of “incomplete” or “inaccurate” message slips when she fired Ochoa.⁶⁷ It is even more strongly reinforced by one of Cadorna’s many digressive observations from the witness stand, in which Cadorna effectively admitted that until that very moment she had never before reviewed Ochoa’s message booklet.⁶⁸ Thus, it appears that the Respondent’s heavy reliance at trial on the contents of Ochoa’s message booklet, and the “error rate” arguably revealed therein, was the product of afterthought—more specifically, of a study of records made by someone (not Cadorna, apparently) after Ochoa had already been fired. And understood

this way, the Respondent’s after-acquired knowledge that Ochoa may have been guilty of a large number of arguable message-taking “errors” does not help the Respondent sustain its *Wright Line* burden of “demonstrating” that Ochoa would have been fired on May 5 for such reason. Indeed, I treat the Respondent’s attempt to support what was quite apparently a post facto rationalization for firing Ochoa as simply one more example of behavior tending to reinforce the prosecution’s case.

Second, and of equally fundamental importance, Ochoa’s supposed “error rate” was never shown to have been of such concern as to trigger anything resembling a “warning” from any of her supervisors that her performance in this respect was unacceptable. At most, giving more weight to McFadden’s and Cadorna’s various (and not mutually corroborative) claims than I think they deserve, one or both of them may have made generalized comments to both Fregoso and Ochoa together (or to the “whole staff”) regarding the importance of “complete” message slips, without ever suggesting that Ochoa’s performance was uniquely unacceptable, much less that her job was in jeopardy over the issue.⁶⁹

(2) Last straws

As to the supposed “icing on the cake” problems allegedly displayed by Ochoa on May 5, we heard a variety of versions—from Cadorna, from McFadden, and from Stewart. McFadden’s version only intermittently harmonizes with Cadorna’s, and Stewart’s own memories of pertinent events cannot be squared with either Cadorna’s or McFadden’s accounts. Most significantly in this regard, I can find nothing in Stewart’s testimony that suggests that Ochoa committed any “errors” on May 5. To illustrate these points, I will summarize Cadorna’s version (which, although itself rambling and confused, is nevertheless the most elaborate and systematic of the three), and I will annotate the main elements of her account with pertinent additional findings and commentary.

On January 12, 1994, the Respondent, through Cadorna, invoked Ochoa’s alleged “misrouting of calls [to] Dan Stewart” on the morning of May 5 as the “icing on the cake,” i.e., as the precipitant for what Cadorna improbably claimed from the start was her own decision to “recommend” (to both “David Freeland and Ophelia McFadden,” she said early on) that Ochoa be fired.⁷⁰ Stripped of digressions and self-contradictions, the enduring elements in Cadorna’s descriptions of the events of that morning are these: At 9 a.m.,

⁶⁵ Id. at 21–22.

⁶⁶ I have reviewed these booklets, comprising at total of nearly 300 pages, each page containing four message slip copies. But for reasons I trust will soon be obvious, if they are not apparent already, I have not tried to make the kinds of tedious (and subjective) comparisons that I would feel compelled to make before accepting the accuracy of the Respondent’s “Message Error” chart.

⁶⁷ Remarkably, the Respondent claims otherwise on brief, relying on an egregious mischaracterization of Ochoa’s testimony (quoted *supra*) as an admission that “McFadden . . . clearly stated [to Ochoa on May 5] that Ochoa was being terminated because she had failed [sic] to properly take telephone messages.” (Br. 27; my emphasis.) Perhaps this mischaracterization of Ochoa’s testimony was simply the result of wishful thinking on the part of briefing counsel, who indeed focused at trial on Ochoa’s alleged failure “to properly take telephone messages.” But I repeat, Ochoa’s undisputed testimony in the very passage cited by the Respondent’s counsel shows that McFadden criticized Ochoa for having “g[iven] out wrong information on the phone,” implying that she was misadvising incoming callers (a charge that I have already found was desperate and unsupported by credible proof), not that she had “failed to properly take telephone messages.”

⁶⁸ On January 12, 1994, in the midst of scrutinizing Ochoa’s booklet for evidence of error, Cadorna gratuitously clucked, “Just looking at this, I wasn’t aware that all this was the level of problem she was having.” Tr. 791:17–19; my emphasis.

⁶⁹ Again, I would credit Ochoa’s and Fregoso’s testimony that none of their supervisors had ever made an issue about “errors” on their message slips. But the point here is that, even if McFadden, or Cadorna (or fellow employee Luz Romana, during an approximately 3-hour orientation session with Ochoa on Ochoa’s first day on the job) may have somehow communicated to Ochoa the importance of filling out message slips completely and accurately, there is nothing of credible substance in the record showing that McFadden or Cadorna had become genuinely concerned about Ochoa’s message slip “errors” before deciding to fire her.

⁷⁰ Tr. 801:14–23. Although Cadorna did not in these passages refer to the May 5 date, her later testimony made it clear that she was referring to May 5 as the date when the “misrouting of calls” to Stewart supposedly occurred.

Cadorna claims to have overheard McFadden “mention” to Ochoa that Ochoa should,

be careful on how she routes the messages for Dan Stewart because he’s waiting for important calls and we [would be] having a meeting. I remember her saying [also] that names should not be blurted out on the intercom.⁷¹

Thereafter, says Cadorna, at about “10:30 or so,” Ochoa “interrupted” the meeting with Stewart by walking-in and telling Stewart he had a call. But when Stewart “picked up the line, nobody was there.” This caused Ochoa supposedly to acknowledge that she “might not have put the person on hold.”⁷² Next, claims Cadorna, Ochoa “routed about two calls” to Stewart in the meeting which Stewart remarked were actually calls for Freeland.⁷³ Next, Cadorna recalled that Ochoa had used the public-address “intercom” to announce yet a *third* call to Stewart, contrary to McFadden’s supposed instructions to Ochoa at 9 a.m.⁷⁴ Finally, Cadorna claims that after this third “interruption,” she herself

⁷¹ I discredit Cadorna on all features of this testimony. McFadden herself failed to corroborate Cadorna, and Ochoa flatly and credibly denied having received any such instructions from McFadden or anyone else on the morning of May 5. Moreover, Stewart described it as “routine” for him to be paged on the “intercom,” referring to the public address system. Ochoa did recall, by contrast, that she had herself sought out Stewart that morning to introduce herself (she had never met him previously) and to find out “which phone calls he want[ed] Ochoa] to hold for him and which ones [she] should put through.” Ochoa recalls that Stewart said in reply that “the only phone calls that he wanted me to transfer was his wife’s and his secretary, and that . . . was it.” Ochoa’s version, incidentally, is fairly easy to harmonize with Stewart’s memory that, on the previous day, May 4, he had been dismayed that one of the receptionists—it is not clear whether he was referring to Fregoso or Ochoa—had failed to deliver certain unspecified messages to him from callers on the East Coast until late in the day, after he had emerged from meetings with McFadden, et al., and too late by then to return the call. As a consequence, says Stewart, he complained to McFadden or Cadorna about getting these messages too late, and asked them to advise the receptionist that he wanted to be interrupted in future meetings when such calls came through.

⁷² Again, Ochoa denied that any such thing happened, McFadden described no such instance, and Stewart’s testimony likewise fails to mention any such event. I discredit Cadorna here, too.

⁷³ I don’t believe Cadorna here, either: Stewart does not corroborate this. The only reference in Stewart’s testimony to a possible “misrouting” of calls concerns something that Stewart recalled had occurred on May 4, when one of the “message slips” that he had received (belatedly, as he had complained) from one of the receptionists (it is not sure who) was, in fact, for “Dave” (i.e., Freeland). McFadden’s version describes only one call “misrouted” by Ochoa to Stewart on May 5, in which Ochoa used the P.A. system to announce that “Dan Stewart” had a call, following which “Mr. Stewart broke from the meeting to take the call,” only to discover that the “call was for David Freeland,” as McFadden learned upon Stewart’s return. (Neither Cadorna nor Stewart mentioned any such “b[reaking] from the meeting”; indeed, Stewart described no problems whatsoever associated with phone messages on May 5.)

⁷⁴ I repeat, for reasons previously stated, I don’t believe that McFadden issued any such instruction to Ochoa. I further repeat that McFadden described only one alleged foul-up by Ochoa on May 5, and Stewart described none. Finally, I repeat that Stewart had no problem with the receptionists’ common practice of using the intercom to page him when he had a call.

reached the judgment that Ochoa must be fired, but admittedly did not communicate this “decision” to anyone until later in the afternoon, supposedly in a telephone call she placed to Freeland from her doctor’s office.⁷⁵

It seems obvious from the annotations to Cadorna’s account that Cadorna and McFadden could not keep their stories straight, neither about supposed last-straw infractions by Ochoa on May 5, nor as to who made the decision to fire her, or precisely why. It is further apparent that Stewart’s testimony damages Ochoa hardly at all, and functioned mainly to undermine or contradict the line that McFadden and Cadorna ineptly tried to follow. Thus, I remain utterly unconvinced from the Respondent’s presentation that Ochoa committed any job performance infraction on May 5 that might plausibly trigger a decision to fire her summarily. Indeed, I infer that such “icing-on-the-cake” claims, like the others before them, were merely pretextuous afterthoughts. As such, they clearly do not satisfy the Respondent’s rebuttal burden under *Wright Line*; they simply reinforce the more obvious interpretation, that the real icing on the cake in the decision to fire Ochoa was McFadden’s discoveries of the Union’s appearance and of Ochoa’s support for the Union.

I therefore conclude as a matter of law that when McFadden dismissed Ochoa, the Respondent violated Section 8(a)(3), and derivatively, Section 8(a)(1). And based on this judgment, I further conclude that Ochoa was properly entitled to vote in the July 16 election in Case 21–RC–19216, and my recommended order provides for the opening and counting of her ballot to determine the election outcome.

III. ALLEGED POST-MAY 21 VIOLATIONS

A. The 8(a)(1) counts

1. McFadden-Mynatt “end of May” (or “May 26”) meeting; Mynatt’s overall credibility

Paragraph 11 of the complaint alleges that on or about “May 26,” McFadden “(a) interrogated employees about the union activities of other employees,” and “(b) created an impression among its employees that their union activities were under surveillance.” The General Counsel relies solely on organizer Mynatt’s testimony about a private meeting she said she had with McFadden near “the end of May” (or “May 26,” as Mynatt later professed to recall more specifically), the same day that Mynatt had returned to the office after a 6-week absence in Seattle, Washington, where she had performed training duties on a related SEIU project, under Stewart’s direction.

This is Mynatt’s version, mostly in her words: McFadden “came by my desk and called me into her office,” and once they were inside, McFadden said, “I know you heard about what’s been going on around here.” Mynatt replied that she didn’t know what McFadden was referring to, and McFadden then clarified that “Josie and those damn Mexicans are try-

⁷⁵ I have already noted that McFadden claims that it was she who decided during the meeting with Stewart (supposedly after Stewart “broke from the meeting” to respond to a call that turned out to be for Freeland) that Ochoa must be fired, and that she so advised Cadorna *during the meeting*. I repeat that neither Cadorna nor Stewart corroborated any of these claims.

ing to start a union.”⁷⁶ Mynatt replied, “That’s good.”⁷⁷ McFadden retorted that it “wasn’t good at this time because she was trying to get the public authority in, and it wasn’t a good time for the Union to come in.” The conversation continued for “quite some time” after that, says Mynatt, whose recounting of the remainder of the supposed exchanges were not only confusing, but struck me as attempts to put second and third coats of guilt on the lily.⁷⁸

⁷⁶From this element of Mynatt’s testimony comes the “impression of surveillance” count in the complaint, which the General Counsel seeks to justify on brief (p. 69) with a single sentence, which is notable for the ambiguity of a key phrase:

By McFadden making the remarks about Fregoso, Mynatt could reasonably assume that her union activities as well as other employees [sic] were under surveillance by the Respondent.

Although there are three female subjects mentioned within this sentence, I think it is safe to assume that McFadden was not the referent of the phrase “her Union activities.” This leaves Mynatt and Fregoso as possible referents. But no matter which of these women was the intended referent of “her Union activities,” the “impression of surveillance” theory would be specious, for it would either collide with inconvenient facts, or would require unwarranted speculation. Thus, if the General Counsel intends to refer to union activities by “Mynatt” (and I think this should be presumed, because “her” is most closely preceded by “Mynatt,” who is the subject of the independent clause), the sentence begs the question, “What ‘union activities?’” It ignores that Mynatt had been absent from the office for the immediately preceding 6 weeks, and was not shown to have participated in *any* union activities prior to her supposed meeting with McFadden on the first day of her return. (Indeed, as I discuss elsewhere below, Mynatt’s testimony—the only record source for a finding that Mynatt was involved at *all* in the Union’s efforts—is that she did not become involved with the Union until “June 10,” at the earliest.) On the other hand, if “her union activities” is intended to mean “Fregoso’s union activities” (which I doubt, for the reason already noted) the “surveillance” theory ignores that McFadden had learned of Fregoso’s Union support by quite direct, albeit unlawful means, but not by spying. Thus, I remain quite unpersuaded that Mynatt might “reasonably” infer from McFadden’s alleged statements that McFadden’s knowledge of Fregoso’s activities had derived uniquely from some form of “surveillance.”

⁷⁷Although Mynatt here suggests that she forthrightly voiced her support for the Union in conversation with McFadden as early as May 26, she admitted on cross-examination, “I hadn’t made up my mind about the Union until I kept getting written up all the time.” And based on further findings below, it is apparent that she was referring to a point on or after “June 10” as the point when she “made up her mind.” And it was only at an uncertain point on or after “June 10,” she says, that she met “in person” with the Union’s Simmons, and “got a [union] card and . . . signed it.”

⁷⁸These are the highlights: McFadden supposedly asked Mynatt if she was “a member of the Union.” (This testimony might support the “interrogation” count in the complaint, but for the fact that the complaint alleges that McFadden “interrogated employees about the union activities of other employees.”) In any case, Mynatt says that she replied, “Yes” to this question (although she was admittedly not then a member of the Union) because what she really meant was that she was a “member” of the Respondent, the “Home Care Workers Union.” Later, Mynatt recalled that “Somewhere [McFadden said that] she didn’t expect the Mexicans to understand, but this was not the time to bring in outsiders because sometimes unions came in and . . . it wasn’t always for the best.” Mynatt further described a confusing set of exchanges in which she says she queried how McFadden could be opposed to the Union when “we [referring to the Respondent] were a union,” and in which she further questioned “how

McFadden, although not invited to deny each element in Mynatt’s account,⁷⁹ testified generally that she had never met “alone” with Mynatt, “without witnesses present.” She explained that “the reason I never met with Burnell alone is because I had always observed Burnell of having an explosive personality, and not really telling the truth after one had talked with her. So I would always have Wilma or David or somebody with me when I talked to Burnell [even] about the weather.”

I treat McFadden’s general denial that she had ever met privately with Mynatt as sufficient to put Mynatt’s account into issue. I conclude that Mynatt’s narration of the alleged “May 26” session is unreliable. This conclusion has less to do with my confidence in McFadden’s word than it does with my overall doubts about Mynatt’s reliability. These doubts trace from a large number of circumstances and considerations, which I will summarize next, to help explain not only my dismissal of the 8(a)(1) counts that depend on Mynatt’s testimony, but as well, the judgments I will reach when I return to the 8(a)(3) and (4) counts involving Mynatt.

Mynatt’s testimony was only rarely straightforward or coherent; she seemed more given to self-serving embellishments and digressions than Cadorna even, and her resort to these devices seemed often to have been quite calculated ones. Thus, many of her digressions seemed intended purely to embarrass McFadden⁸⁰ (although Mynatt also volunteered unflattering remarks about other supervisors and colleagues

we could fire people, and we were a union.” (Mynatt, who had been out-of-state for the immediately preceding 6 weeks, and who had professed initially not to know what McFadden was talking about when she had referred to “what’s been going on around here,” never explained how she had come to learn that one or more persons had been “fired.”)

⁷⁹One apparent explanation for the Respondent’s counsel’s failure to invite McFadden specifically to deny the elements of Mynatt’s account of the “May 26” meeting is that counsel is satisfied that he has independently established a “firm alibi” for McFadden on May 26—that “McFadden was in Washington, D.C., from May 22 to May 28, 1993.” (R. Br. 64.) In this respect, counsel is quite mistaken. The purported *alibi* evidence (bank credit card transaction summaries of at best equivocal import relating to a trip McFadden took to Washington, D.C., sometime in late May, joined to McFadden’s confused testimony about the timing of this trip) does not reliably prove what counsel sought to prove. In fact, McFadden did not independently recall that she was in Washington, D.C., from “May 22 through May 28”; rather, she merely answered, “Yes,” when counsel suggested those dates to her in an introductory question. (Tr. 1306:17–19.) And she later testified, contrary to this, that she had “return[ed] to Los Angeles” on “5–26.” (Tr. 1308:20–21.) Moreover, she eventually confessed to being quite unsure about any of the pertinent dates, after I questioned her about the credit card records and suggested alternative interpretations of the date entries on them. Indeed, she said that she would have to consult her “diary,” which was “at home,” before being certain about the timing and duration of her trip. (Tr. 1308:22–1310:25.) With matters in this inconclusive posture, it was clearly in the Respondent’s interest to review McFadden’s diary, and if such review tended to support the claimed *alibi*, to report on the results of that review. Yet, the Respondent did not thereafter disclose the results of any such review. And from this default on the Respondent’s part, I infer that McFadden’s diary did not support a May 26 *alibi*. Therefore, if *alibi* were the only defense available to the Respondent in this instance, I would judge that the Respondent failed to establish one.

⁸⁰E.g., Tr. 1475:18–20. See also Tr. 663–667, further illustrating this point and others made above and below.

in the organization). In other cases, Mynatt's meanderings were seemingly intended to defuse anticipated challenges to her credibility or behavior in certain instances, well before any such attack had been made, and she thus presented as an overly defensive witness.

Some of Mynatt's narrations (as in her account, *supra*, of the "May 26" meeting with McFadden) clearly were intended by her to imply that she had made common cause with Fregoso, Barragan, Marroquin, and other known supporters of the Union, and had fearlessly declared to McFadden her solidarity with the efforts of those others to get union representation. And these suggestions in Mynatt's testimony are relied-on heavily by the General Counsel as the predicate for his claims that Mynatt was the victim of unlawful discrimination. But the record contains not a shred of corroboration for Mynatt's implicit portrayal of herself as a Union stalwart.⁸¹ Neither is there any evidence—other than in Mynatt's accounts of her "May 26" meeting with McFadden—that would support an inference that the Respondent's agents *perceived* Mynatt as a union supporter (at least not at any time before July 19, when Mynatt and several other organizers received subpoenas from the Union to testify at a representation case hearing on issues raised by the Union's petition for an election in the organizers unit).⁸²

⁸¹ Apart from her account of the supposed "May 26" meeting with McFadden, Mynatt made six assertions that were apparently intended to suggest that she was an active and visible supporter of the Union's organizing drive: (1) She claimed that she reported to Fregoso what had happened in her "May 26" meeting with McFadden, "[p]robably that [same] night, or over the phone"; (2) she claimed that during the "Holiday Inn" conversation with Stewart (*infra*)—which occurred on either June 10 (the date recalled by Mynatt) or June 11 (the date recorded on a critical memo Freeland issued to Mynatt concerning her call "this morning" to Stewart)—Stewart "advised" her that she should "seek for Union representation"; (3) she claimed that after Stewart thus "advised" her, she met "on June 10th" with the Union's agent, Kitty Simmons, but admittedly only "after," and "as a result of [her] being written up." (She had received writeups on June 1, 11, and 24.) And it was apparently during this supposed meeting with Simmons that Mynatt claims, (4) that she "told Kitty" about McFadden's statements to her on "May 26." And finally, without specifying the timing of such actions, Mynatt claimed, (5) "I got a card, and [6] I signed a card." The General Counsel did not invite either Fregoso or Kelly to support any of these enumerated claims, although both were clearly "available" to the General Counsel, and both clearly qualified as "witness[es] who may reasonably be assumed to be favorably disposed to" the General Counsel, the "party" in whose interest it was to establish the truthfulness of Mynatt's claims. (*International Automated Machines, Inc.*, discussed, *supra*, in connection with the Respondent's failure to call Freeland.) Moreover, if Mynatt "signed a card" for the Union, it was not submitted into evidence.

I will therefore draw the appropriate adverse inferences in the circumstances—that Fregoso would have contradicted Mynatt as to claim (1); and that Kelly and the Union's records would have contradicted her as to claims (3) through (6). Finally, as to claim (2), I am more persuaded by Stewart's credibly uttered and contradictory testimony: He agrees that Mynatt had called him at the Holiday Inn to complain about a variety of problems she was having with the Respondent's administration—particularly McFadden, but he denied that they discussed the subject of the Union, and he further denied that he advised her to "seek representation" from any union.

⁸² McFadden and Cadorna admittedly knew that Mynatt was one of the organizers who had been subpoenaed on July 19, and they might have thus inferred that Mynatt was in some way "friendly"

There is much in the record suggesting that Mynatt had other axes to grind: She had admittedly crossed swords with McFadden and other supervisors well before the Union made its appearance, and these experiences had engendered admitted mutual resentment between Mynatt and McFadden. Thus, in early March, after having been employed for less than a month, Mynatt had received a written warning for the "unacceptable" way she had recently "spoken to" McFadden during an angry encounter between them at a recent beer and pizza get-together of the staff.⁸³ According to Mynatt, McFadden had declared, after several heated exchanges, that she should "just get rid of" Mynatt, following which Mynatt had defiantly replied,

You didn't hire me, and I don't think you should talk about firing me, because Dan Stewart hired me, and when he gets ready to fire me, we will sit down and talk about it, 'cause that's the way it should be.⁸⁴

Much additional antagonism between Mynatt and her supervisors traced from Mynatt's unsuccessful bid in early March to get the Respondent to provide her with an airplane ticket, or to lend her money for one, to attend funeral services in Arkansas for her brother. When Freeland refused this request, Mynatt had then called SEIU headquarters in Washington, D.C., in the hope of getting Stewart or some other official to authorize such aid. (She was unable to reach Stewart, and the person she talked to turned her down.) Thus thwarted, Mynatt had next filed a claim with the Respondent for 3 days' paid bereavement leave, a claim she admittedly was still maintaining on June 10 or 11, when she complained about this and other beefs she had with McFadden to Stewart, during a call to him at his room at the Holiday Inn. However, in the intervening months, as Mynatt also admits, Freeland had several times demanded as a condition of payment that Mynatt produce documentation that she had, in fact, traveled to Arkansas for the funeral,⁸⁵ which, as she now admits, she had not done, although she appears to have exhibited a curious reluctance throughout the attenuated pe-

to the Union. (However, I note that by July 19, Mynatt was already aggrieved over having received several disciplinary write-ups, including the June 1, June 11, and June 24 memos that the General Counsel has belatedly chosen to attack as having been intended to punish Mynatt for her union support and activities. And obviously, whatever "knowledge" of Mynatt's support for the Union the Respondent's agents may have gained based on the July 19 arrival of the subpoenas does not help the General Counsel prove that the write-ups issued to Mynatt in June were unlawfully discriminatory.)

⁸³ This warning notice was not offered into evidence; the quotes are of Mynatt's characterizations of the warning, at Tr. 416:12-14.

⁸⁴ Tr. 653:17-21. (I do not decide whether Mynatt's account of the episode is accurate in all its particulars, but her characterizations of her own behavior adequately establish the point now under discussion.)

⁸⁵ According to R. Exh. 5, Freeland had "confirm[ed]" in writing to Mynatt on March 16 that, "in order to be paid three days bereavement leave, the funeral home needs to confirm that you attended the service on Saturday March 6, 1993." I note that Mynatt at one point denied that she had ever previously seen this memo, and elsewhere claimed that she did not "recall" ever having seen this memo, even though she soon admitted that the handwritten initials, "BR" on it "appear to be mine." I fully accept the authenticity of the exhibit, and I regard Mynatt's equivocations as wholly disingenuous.

riod of her bereavement pay claim to disclose this latter fact to her supervisors.⁸⁶

Mynatt was admittedly “upset” by such early experiences on the job, and her lingering resentments may be presumed to have been exacerbated by several more recent run-ins with the Respondent’s administration in the months after the Union’s emergence, such as her receipt of three disciplinary memos from Freeland in June, described *infra*. And I think that such abiding resentments best explain another set of qualities displayed prominently by Mynatt throughout her several visits to the witness stand—her total unwillingness to concede that there might be at least *some* degree of merit to at least *some* of the criticisms she was receiving from her supervisors, and her nearly reflexive tendency instead to respond to every such criticism with counterassertions and excuses that were either themselves contradicted by credible evidence, or were so inherently implausible as to suggest that she suffered from what is popularly called a “persecution complex.” (The aura of near-martyrdom that often pervaded Mynatt’s testimony became the most palpable when she was invited by the General Counsel to explain her failure to join her colleagues at a memorial rally held in Watts on a Saturday in late November, the subject of a warning memo which the General Counsel now alleges to have violated Section 8(a)(3) and (4). In substance, Mynatt’s explanation was that she feared that McFadden might have her murdered at the rally.⁸⁷)

Mynatt’s claims about what McFadden said in the “May 26” meeting cannot be dismissed as inherently implausible; indeed, they would fit quite neatly with my earlier findings that McFadden deeply resented the Union’s appearance and Fregoso’s key role in the Union’s campaign. But considering all the other circumstances I have summarized, I find it decidedly improbable that in late May McFadden would have chosen Mynatt as a *confidante*; indeed, I find it more plausible, as McFadden suggests, that Mynatt would be the last person in the organization McFadden would have chosen in

late May to invite into a private meeting to share her concerns about the Union’s advent. Moreover, even if some kind of “meeting” took place between Mynatt and McFadden on or about May 26, my overall doubts about Mynatt’s reliability would leave me helpless to tease out whatever truthful elements might exist in her various narrations of the meeting. Thus, I will not credit Mynatt as to the supposed “May 26” meeting, and I will therefore dismiss paragraph 11 of the complaint in its entirety.

2. Other counts relying on Mynatt

Complaint paragraph 13; “About July 1993, the exact date being unknown to the General Counsel but particularly within the knowledge of the Respondent, Respondent, by McFadden threatened to discharge its employees if they selected the Union as their bargaining representative.” As I elaborate below, the General Counsel elicited testimony from Mynatt which, if credited, would establish that on July 19, McFadden threatened to fire anyone who *received subpoenas* from the Union to appear at a representation case hearing the next day. The obvious disparities between pleading and proof in this instance suggest strongly that the claim made by the Regional Director in paragraph 13 was simply abandoned at some point, and was replaced, *sub silentio*, with a wholly new claim during the trial.⁸⁸ However, setting aside such irregularities, I will find that even the apparently substituted allegation was not sustained by reliable proof.

This is the undisputed background: On July 19, in the late afternoon, union-issued subpoenas to organizers Mynatt, Marroquin, Agdaian, and Barragan arrived at the Respondent’s offices. The subpoenas called for attendance the next morning at a Board representation case hearing on issues raised by the Union’s election petition in the organizers unit. McFadden and Cadorna were admittedly irritated and dismayed by this last-minute notice that a substantial number of the organizers would be otherwise occupied the next day. Indeed, Cadorna promptly issued a memo that effectively instructed the subpoena recipients to dishonor the subpoenas—an instruction that is not itself called into question by the complaint.⁸⁹

⁸⁶ It was not until late in the day of the December 8 trial session that Mynatt tearfully disclosed that she had not traveled to Arkansas for the funeral. Although she tried in nearby passages to explain away this fact as irrelevant to her claim (because she thought that she was entitled to 3 paid days off simply to “grieve” her brother’s passing, no matter where she conducted her grieving), I find it striking that she did not straightforwardly report her nontravel to Freeland when he first asked her for “documentation” that she had “attended” the funeral, which he clearly had done as early as March 16. It might have saved everyone a lot of grief if she had done so. (Mynatt elsewhere testified that she disclosed her nontravel to Stewart—and apparently, only to Stewart—during their June 10 or 11 “Holiday Inn” conversation. However, Stewart testified that, in fact, Mynatt had told him that she had traveled to Arkansas for the funeral. I credit Stewart. But even if I were to credit Mynatt on this point, it would not explain why Mynatt had been for months dodging Freeland’s persistent attempts to get Mynatt to document her travel, as a condition of paying her on her claim.)

⁸⁷ Mynatt went on to explain that her fear of murder or injury at McFadden’s hands was one that she had been entertaining since at least “June,” but that such fears were significantly heightened when, shortly before the rally, McFadden had voiced a wish to “kill all the women [in the office] so that she could “have the men to herself.” (McFadden admittedly had made some such remark during an informal office photo session, when McFadden had asked for one snapshot to be taken with only the men in the office grouped around her. I will find that her remark was obviously facetious.)

⁸⁸ It is apparent for at least two reasons that Mynatt’s testimony about what McFadden allegedly said and did when the subpoenas arrived on July 19 was not what the Regional Director had in mind when, on September 30, she included the par. 13 count, *supra*, in her “Second Order Consolidating Cases, Consolidated Amended Complaint and Notice of Hearing.” First, it would have been easy for the director to ascertain the timing of the issuance and service of these subpoenas, and therefore, if Mynatt’s claims about the events of July 19 were the basis for complaint par. 13, we may presume that the director would not have pleaded the timing as vaguely as she did. Second, while Mynatt’s account would support a claim that McFadden threatened to discharge employees who received a subpoena, it would exceed the tensile limits of her account to allege in the complaint that McFadden’s remarks involved a threat to fire employees “if they selected the Union as their bargaining representative.”

⁸⁹ In this group memo to all the subpoena recipients on July 19, Cadorna, presumably at McFadden’s direction, announced that she could not “approve time off for any of you due to such a short notice[.]” and directed the recipients instead to “maintain your schedule for tomorrow,” closing with the reminder to the organizers that they had “committed to reach a goal of organizing 1100 workers by the end of July[.]” and that “Time is of the essence.” The

Mynatt testified that McFadden, in the presence of Cadorna and organizer Frank Streeter, delivered her subpoena by “slamm[ing] it down” onto Mynatt’s desk, exclaiming as she did so that “[A]nybody I have to serve this damn subpoena to will be fired.” McFadden denied saying this (she also denied the “slamming down” of the subpoena, and indeed, she insisted that Mynatt was not even in the office when the subpoenas arrived and were left on the subpoenaed organizers’ desks). Cadorna and Streeter likewise denied that McFadden said or did any such things. For reasons previously summarized, Mynatt’s word alone is not enough to sustain the General Counsel’s burden, especially not where she is contradicted by three witnesses. I shall therefore dismiss complaint paragraph 13.⁹⁰

Complaint paragraph 14; “About the beginning of August . . . McFadden . . . (a) admonished its employees for engaging in union activity; (b) threatened its employees with discharge because they engaged in union activities; (c) informed employees that it would be futile for them to select the Union . . . and (d) promised its employees benefits . . . if they rejected the Union[.]” Largely for reasons already noted, I also find unworthy of credence Mynatt’s testimony as to another supposed private meeting with McFadden, this one in “the first week of August,” in which Mynatt claims, among other things, that McFadden (1) told Mynatt that “this mess has got to stop between you and Josie,” and (2) confessed to Mynatt that she had “got rid of Julio,” and intended to “get rid of [organizer] Rudy Barragan, too, ‘cause he’s part of this mess,”⁹¹ and then (3) abruptly switched gears, complimenting Mynatt’s performance and plying her with hints of a “management” job in the organization (“Cathy Baker’s office could be [yours]”),⁹² but only if (5) Mynatt would “stop associating with the wrong people,” such as “Josie and Julio and them.”⁹³ McFadden denied

legality of this instruction was not called into question by the complaint, and the General Counsel disclaimed any such challenge when he introduced the memo into evidence for a different purpose on January 12, 1994.

⁹⁰As a separate matter, I note that the General Counsel has unworthily distorted his own evidence by now seeking to characterize Mynatt’s version of McFadden’s remarks as involving a discharge threat directed specifically at Marroquin. Thus, at p. 24 of his brief, the General Counsel introduces Mynatt’s testimony with a headline declaring that McFadden’s remarks constituted a “Threat to Terminate Marroquin.” And at p. 65, the General Counsel again casually interweaves this distortion into his discussion when he says (my emphasis),

On, [sic] July 19, the same day that McFadden threatened Marroquin with discharge for receiving a subpoena, Cadorna issued another warning accusing Marroquin of incomplete “To Do Lists.”

⁹¹Barragan was never fired, so far as this record shows, and the prosecution makes no claim that he was the victim of any unlawful discrimination. Indeed, elsewhere, the General Counsel cites the fact that Barragan did not receive writeups when he supposedly committed offenses similar to those for which Marroquin was written up as evidence of the Respondent’s discriminatorily “disparate treatment” of Marroquin.

⁹²By this point, according to Cadorna’s undisputed testimony, Cathy Baker had taken over direct supervision of the office clerical staff, because Freeland’s departure in July had required Cadorna to take over direct supervision of the organizers.

⁹³Again, given the admitted personal antagonisms between McFadden and Mynatt that had by then accumulated I doubt that

having said such things to Mynatt, but again, I would not rely on McFadden’s denials; rather, I will dismiss all counts within paragraph 14 because Mynatt’s word alone was not enough to satisfy the General Counsel’s burden of persuasion.

3. McFadden’s alleged “mid-June” remarks to Marroquin as an “impression of surveillance” violation

Paragraph 12 of the complaint alleges that, “About mid-June . . . McFadden . . . created an impression among its employees that their union activities were under surveillance.” The General Counsel relies on Marroquin’s and Mynatt’s mutually harmonious (but rather fragmentary) testimony concerning events occurring at a regular meeting between the Respondent’s management team and the staff of organizers, a meeting held either on June 18 or June 9.⁹⁴ Marroquin and Mynatt agree that during the meeting in question, McFadden remarked to Marroquin that he should be devoting his time to getting his own “numbers up” (referring to the “quota” of new homecare worker-members Marroquin was expected to recruit for the Respondent) “instead of [or ‘rather than’] trying to organize” the Respondent’s employees.⁹⁵ McFadden generally denied having made such a statement, and Cadorna likewise testified that she had never heard McFadden say anything like this to Marroquin in any meeting. For reasons I explain next, I don’t think a credibility resolution is required on this point. Instead, I will assume, *arguendo*, that McFadden made a statement to Marroquin in one of the June meetings roughly matching the

McFadden would have risked taking Mynatt into her confidence in the way Mynatt’s account suggests she did. Moreover, McFadden knew by then that Mynatt had been one of the organizers the Union had subpoenaed for the hearing on the Union’s election petition in the organizers’ unit. And Mynatt’s version requires us to suppose that the same woman who had vowed 2 weeks’ earlier to “fire” anyone who had received a subpoena from the Union, would now select Mynatt, one of those subpoena recipients, for a *tete a tete* in the hope of dissuading Mynatt from her supposedly widely known support for the Union. And again, where the record otherwise fails to disclose any ongoing links between Mynatt and “Josie and Julio and them,” I am left wondering what “associations” McFadden could possibly have had in mind. For the same reason, I wonder what “mess between [Mynatt] and Josie” McFadden could possibly have been referring to.

⁹⁴The record includes “minutes” of meetings with the organizing staff held on both those dates. (The minutes do not disclose any remarks by McFadden that might relate to the complaint count in question.) Marroquin’s testimony seems to assume that the meeting in question was on June 18. Mynatt’s even more erratic testimony leaves me uncertain which date she intended to refer to. On brief, the General Counsel appears to sidestep the question of timing in his factual narration by referring simply to a “mid-June” meeting at one point (p. 18), but later, in his concluding arguments (p. 61), he appears to embrace “June 18” as the date in question.

⁹⁵Neither Marroquin nor Mynatt offered much by way of surrounding context for McFadden’s alleged remarks. However, it is quite clear from the uncontested “minutes” of the June meetings and from the testimony of several witnesses that, in both meetings, Stewart and McFadden had been exhorting the organizers to get their new-member “numbers” up, and that some of the organizers had been complaining about the difficulties they were experiencing in meeting the sign-up “quotas,” and that Marroquin had been one such complainer.

one that Marroquin and Mynatt described,⁹⁶ one that in any case implied her belief that Marroquin was involved in organizing for the Union.

The General Counsel argues on brief (p. 61) that,

[b]ecause McFadden told Marroquin . . . that he should be trying to improve the number of members that he was trying to organize rather than to try to organize [the Respondent's] employees, Marroquin could reasonably believe that his union activities had been placed under surveillance.

I doubt it. Here, as in other cases where the complaint has indiscriminately charged the Respondent with "impression of surveillance" violations, the issuer of the complaint has simply ignored what the record made by the prosecution otherwise shows—that, by "mid-June," McFadden had already gained knowledge of Marroquin's support for the Union without having had to resort to spying, and Marroquin himself knew this. Thus, as early as May 20, Marroquin's name had appeared prominently on the employees' letter seeking a meeting between McFadden and the combined staff of organizers and office workers, and Marroquin had distinguished himself further by personally confronting McFadden with the question whether she would be willing to have such a meeting. Moreover, during one of the May 21 "polling" sessions conducted by Cadorna and Freeland—themselves undertaken in reaction to the employees' May 20 letter—Marroquin had directly told Cadorna and Freeland that he had signed a card for the Union and intended to help in the Union's organizing efforts. Because it was no secret that Marroquin was an active supporter of the Union, Marroquin could hardly have been surprised when, during the "mid-June" meeting in question, McFadden made a remark that assumed that Marroquin was involved in organizing activities for the Union. And for essentially the same reason, I cannot accept that McFadden's remark would have "reasonably" induced Marroquin to suspect that his union activities had been "placed under surveillance." I will therefore dismiss the count in paragraph 12 of the complaint for want of a plausible evidentiary predicate.

⁹⁶I remain doubtful that Marroquin could accurately capture the precise formulation that McFadden used. Thus, Marroquin recalled that McFadden made a similar remark to him later, during a July 16 "final warning" session. Concerning the latter event, Marroquin initially testified that McFadden had told him that he "should be organizing homecare workers and not the staff." (Tr. 522:17–20.) Soon thereafter, however, he was asked, "How, exactly, did [McFadden] put it?" After appearing to deliberate, Marroquin then quoted McFadden as saying to him, "The only skills that you have shown is that you are good at organizing the staff here, but not organizing homecare workers." Thus, considering the surrounding context of the June meetings, I think it just as possible as not that McFadden's remarks in the "mid-June" meeting were similar to Marroquin's most deliberate recollection of her "July 16" remarks. And if so, they were legally innocuous remarks, in that, unlike the other formulations recalled by Marroquin, they could not be construed as an "instruction" to Marroquin to stop his in-house organizing efforts; instead, they suggested only that he should be putting the same zeal into the job he was paid to do, organizing homecare workers.

B. The 8(a)(3) and (4) Counts

1. Marroquin

a. Introduction and overview

As I have previously explained, the complaint, as it was amended on January 14, 1994, now alleges not only that union-hostile motives inspired the Respondent's decision to fire Marroquin on July 21, but that the same unlawful motives likewise tainted the series of corrective memos the Respondent issued to Marroquin in the month before he was fired, starting with three memos issued by Freeland to Marroquin on June 28. These predischARGE memos can be summarized for introductory purposes as reflecting a "documenting" of increasingly critical face-to-face encounters between Marroquin and his supervisors—first Freeland, later Cadorna, and still later, Cadorna and McFadden, joined in a "Final Warning" session on July 16 by Stewart. Many of the encounters thus documented related to Marroquin's failure to turn in daily reports and work plans ("Tally Sheets" and "To Do Lists") on time, or in an acceptably "complete" form. But as time wore on, the focus of these sessions expanded to the generally "unenthusiastic" or "negative" attitude Marroquin was displaying toward his organizing work.⁹⁷

Everyone agrees that Marroquin had never received any writeups before June 28. It is equally clear that by June 28, the Respondent's agents knew or had good reason to believe that Marroquin was a union card signer and that he was helping in the Union's organizing efforts. And it is this combination of circumstances that the General Counsel stresses as he now advances on brief a more refined theory of prosecution, central to which is the claim that the corrective memos issued to Marroquin on and after June 28 were merely designed to camouflage an unlawful "scheme" to get rid of Marroquin. And a critical element of this "pretextual" or "bogus" scheme, as the General Counsel variously characterizes it, was to assemble enough documentation of Marroquin's supposed misdeeds to justify his dismissal under the Respondent's established system of "progressive discipline." I observe in this regard that the General Counsel's claims as to these memos necessarily imply that such a scheme must have been arrived-at on or before June 28, when Marroquin received the first of these memos, and that not just McFadden, but Freeland, Cadorna, and even Stewart,

⁹⁷It is perhaps obvious even before I get into the details of those memos that, absent a challenge to the legality of the motives underlying their issuance, they might go a long way towards making plausible the Respondent's defense to Marroquin's discharge—that, despite many warnings and opportunities to improve, Marroquin's performance, his attitude, and his responsiveness to supervision were spiraling steadily downward. And it is therefore curious that the complaint did not challenge these memos from the start as discrete acts of unlawful discrimination, and nearly inexplicable that counsel for the General Counsel, with the Regional Director's authorization, several times disclaimed any challenge to the lawfulness of the memos before finally seeking to amend the complaint on January 14, 1994, to make precisely such attacks. Having noted this, however, I must add that the General Counsel's disclaimers, which he effectively retracted when he tendered his "Third Amendment[s]," have not influenced my assessment of the merits.

too, must have been co-conspirators in the discriminatory scheme posited by the prosecution.

I will eventually narrate in greater detail what the record reveals about the circumstances surrounding Marroquin's receipt of each memo; but it deserves immediate mention that, while the General Counsel claims "pretext" in the issuance of these memos, he has not distinctly challenged the accuracy of any of the facts asserted within any of the memos.⁹⁸ Also worth noting is that the issuance of warning slips was hardly an unfamiliar or novel phenomenon in the Respondent's operation. (Indeed, although the General Counsel seems to have forgotten this in his arguments as to Marroquin's treatment, he has elsewhere emphasized that the Respondent "has a long and honored tradition of disciplining employees in writing."⁹⁹) Moreover, Marroquin's admissions, *infra*, require the General Counsel to concede that Marroquin had not only "lost" his "enthusiasm" for the job, but had admitted this to his supervisors in a variety of rather vivid ways, beginning as early as June 9, and continuing as late as July 16. Apparently, therefore, the General Counsel's charge of "pretext" rests ultimately on his judgment that the offenses charged to Marroquin in the various memos were in themselves trivial, a judgment that is itself bottomed on two circumstances—first, that Marroquin had committed arguably similar offenses in the past, but had never been written-up for them, and second, that other organizers committed arguably similar infractions without *always* getting written-up for them.

My findings in Section II include elements that would nourish at least a suspicion that the General Counsel is on target in his claims, for I have found that the Respondent defense of its dismissal of Ochoa was permeated by phony or exaggerated claims against her. What is less certain is whether or not my previous findings contain enough to support the "inference" that Marroquin's treatment at the Respondent's hands was tainted by the same unlawful motives that caused the Respondent to fire Ochoa. Although I have some doubt on this score, I acknowledge that a plausible chain of reasoning could be assembled from my previous findings to support a presumption that unlawful motives at least tainted the Respondent's treatment of Marroquin in the complained-of instances.¹⁰⁰ Therefore, in *Wright Line* terms, I will assume

⁹⁸This is true even though certain assertions made by Cadorna in the "July 16" and "July 20" memos about Marroquin's tardiness in submitting recent work plans are seemingly contradicted by Marroquin's testimony, a point to which I will return in the next section.

⁹⁹G.C. Br. 54, discussing Ochoa's dismissal.

¹⁰⁰Thus, the facts as I have found them reveal employer *animus* of a particularly pungent kind—that McFadden bitterly resented the employees' efforts to get union representation, and that both McFadden and Cadorna let the employees know of that resentment in unlawfully coercive ways, and that McFadden made that hostility even more vivid by summarily firing Ochoa when McFadden learned on May 5 of the Union's appearance and of Ochoa's support for it. They further establish employer "knowledge" of Marroquin's Union activism before June 28. Moreover, Cadorna's statements to Fregoso and Marroquin during the May 21 "polling" sessions reveal that the Respondent, in reaction to the employees' interest in union representation, was *threatening*, at least, to start enforcing the "rules" more strictly. And the General Counsel could obviously rely on these findings to argue that such a tightening-up was *implemented* in

that the prosecution has established a *prima facie* case of unlawful discrimination against Marroquin, and that the Respondent could escape liability only by "demonstrating" that Marroquin would have gotten the same treatment without regard to the Union's presence or his own support for the Union.

I will conclude that the Respondent has adequately demonstrated that its dismissal of Marroquin, and its prior issuance to him of the series of corrective memos, would have been done for independent, *bona fide* reasons even if the Union had never appeared on the scene. But to understand this conclusion requires first a better view of the overall conditions prevailing in the June–July period on which we now must focus. Therefore, I will extend this introduction by describing with more particularity what the organizers and their supervisors were doing and were expected to do during this period (apart from dealing with the Union's organizing drive), and by giving more concrete illustrations of the pressures *both* groups were operating under to meet the "quotas" that had been recently announced by Stewart, and by examining how Marroquin had admittedly reacted to those pressures as early as June 9.

During the June–July period, the organizers were expected, unless specifically excused, to maintain an 8 a.m. to 8 p.m. work schedule on Monday through Friday.¹⁰¹ They usually started their workday with several hours of "phone-banking" (i.e., telephone soliciting) from a room containing 17 phone cubicles set up for that purpose in the Vernon headquarters.¹⁰² Following this, they would leave the office to conduct "home visits," where they would normally try to get signed membership cards and checkoff authorizations from persons reached previously by phone-banking, and to conduct a variety of "community outreach" activities, such as visiting neighborhood "seniors centers." Later in the afternoon, they would return to the office, to do more phone-banking, to return calls, and to fill out required paperwork. Their paperwork duties included preparing and submitting their "Tally Sheets," reflecting the names of the people they had called that day and the results of those contacts, and preparing their "work plans" for the next day on a "To Do" list form. These were exercises intended by the Respondent both as a motivator for the organizers, to "keep their eyes on the ball," and as a means by which Cadorna (and/or Freeland, in January through June) could effectively monitor the organizers' daily activities and productivity, and perhaps redirect their intended efforts.

A digression is warranted concerning these paperwork exercises: Although he equivocates on the point, the General Counsel sometimes suggests on brief (echoing Marroquin)

Marroquin's case when the Respondent began issuing corrective memos and warnings to him.

¹⁰¹According to Marroquin, a Saturday morning shift was also required.

¹⁰²The phone bank operation closely resembles a telemarketing "boiler room" in both its physical setup and its function: The organizers, working in adjacent cubicles, read from printed "rap sheets" when they make "cold calls" to homecare workers listed on a print-out furnished by the Respondent. If the worker thus contacted shows interest, an organizer (usually the one who made the initial phone call) will followup with a personal visit to the worker's home, in the hope of getting her to sign an application for membership and a dues-checkoff authorization.

that until the Union came into view, the Respondent had not made much of an issue over the organizers' completing of Tally Sheets and To Do Lists. These suggestions are largely contradicted by the record, which shows rather clearly instead that these paperwork requirements were nothing new to the operation in the June-July period, and that they had always been emphasized as an important feature of the organizers' jobs. Thus, Marroquin himself admitted that Cadorna had told him during his initial training in late 1992 that he must complete these forms "every time we go out" (meaning, in context, every day). And Cadorna had unmistakably reiterated these instructions, and had made them more specific, in a "MEMO TO: ALL STAFF ORGANIZERS" that she published in late January. There, Cadorna had announced Freeland's arrival as the Respondent's "Organizing Coordinator," and had directed that "David will supervise ALL ASPECTS of our organizing drive and he is the first person that you must be accountable to on your day to day schedule."¹⁰³ And significantly, Cadorna had ordered in that memo that "All Organizers must SUBMIT A DAILY To Do List to David the night before or first thing in the morning[.]" and likewise a "DAILY TALLY SHEET of their phone banking each day." Moreover, she had directed that the organizers must "[r]eport any changes on your 'To Do List' to David." And Cadorna had underscored the importance of these instructions with these final words:

David has been instructed to give you one verbal warning if you miss any of the above, then you will be written up. Three (3) write-ups will be cause for termination.

Finally, and again undermining the suggestion that the Union's appearance triggered a retaliatory tightening-up of the paperwork rules in Marroquin's case, is the parties' narrative stipulation, which shows that, before the Union arrived, the Respondent had targeted three organizers for a total of four written disciplinary warnings relating to missing or incomplete or untimely "To Do Lists."¹⁰⁴ Moreover, the same stipulation shows that in the months following the Union's arrival, many organizers other than Marroquin received similar writeups. And significantly, these included organizers not identified on this record as adherents of the Union, as well as organizers Agdaian and Barragan,¹⁰⁵ who appear on this record to have had visibility as union supporters roughly equal to Marroquin's, but whose writeups have never been charged or pursued as unfair labor practices.

There is no dispute that the Respondent's management team and its staff organizers were laboring under especially heavy pressure to produce new members in the June-July pe-

riod, and that some organizers, especially Marroquin, were chafing under these pressures. The minutes of the organizers meeting held on June 9 illustrate these points quite well,¹⁰⁶ and their substantial accuracy is conceded by the General Counsel.¹⁰⁷ In substance, the June 9 minutes reveal as follows:

Freeland spoke first, outlining specific "task assignments" for the organizers in a planned "major mobilization" (or "rally") to be held on June 17, when the State would open a "public hearing (in Sacramento) on the State regulations regarding the Personal Care Services Program." In this regard, Freeland emphasized that "[e]veryone is expected to maintain the hours of 8 a.m. to 8 p.m. to do phone banking as well as organization drop-offs for the rally."

Then Stewart took over the chair. He announced that "we are close to [getting] a public authority," and he "placed a high premium on our ability to organize workers on a countywide basis, and stressed that the stakes are high in our ability to organize workers, which is central to our fight for a public authority in the County." Then, referring to developments at an earlier meeting, Stewart "re-emphasized . . . his directive to enforce the goals of 30 membership recruitment a week, per organizer within six (6) weeks."¹⁰⁸ He added that "if these goals were not met, it [would be] difficult to rationalize the subsidy that the International is investing in this operation." He also "expressed his dismay on the inabilities of the staff organizers to meet the quota that they [had] set for themselves."

At about this point, Stewart digressed, and read aloud a letter from "OPEIU [the Union] asking him to speak to General Manager Ophelia McFadden and encourage her to conduct a card count for the staff organizers who has [sic] petitioned to join OPEIU and create a bargaining unit." He then stated "that it is always the right of workers to organize a Union. However, he will not give card recognition, OPEIU must go through the normal election procedures."¹⁰⁹

Following this, Stewart returned to the subject of "goals"; he stated that "there seems to be a problem on how [the or-

¹⁰⁶ So, too, do the minutes of the June 18 meeting, which I will not trouble to review here because they are merely cumulative on the points under discussion.

¹⁰⁷ The minutes of the June 9 meeting (R. Exh. 20) were tendered into evidence by the Respondent without objection; indeed, upon my inquiry, the General Counsel "accept[ed those minutes] as substantially accurate reports of the events at [that] meeting." Moreover, while they do not purport to completely record in transcript form everything said at the meeting, what they do recite is not contested. Accordingly, I will rely on the assertions contained in the minutes.

¹⁰⁸ It was apparently a pre-June 9 meeting that Mynatt was referring to when she testified (Tr. 285) that at some meeting, after much debate about the fairness of then-imposed "quota" of "40" new members per organizer per week, the Respondent's management and Stewart had agreed to reduce the quota to "30."

¹⁰⁹ Marroquin startlingly testified during cross-examination that Stewart made some statement (apparently in this meeting) to the effect that he had seen organizers' careers suffer after they became involved in internal organizing for union representation. The complaint does not allege that Stewart did anything wrong. No other witness corroborated Marroquin on this point, and Stewart flatly and convincingly denied making any such statement. I think we are presented here with another example of Marroquin's tendency to substitute his subjective interpretations of statements he heard for the words he actually heard, and therefore I give his testimony here no weight.

¹⁰³ Here and below, the capitalizations and other forms of emphasis in Cadorna's memo are set forth as they appear in the original text.

¹⁰⁴ See, and compare, the summary appearing in Jt. Exh. 1, p. 2, par. 3, and the more specific "Summary of Disciplinary Memorandums" attached as Exh. A. The former summary reflects that, prior to July, the Respondent had issued three warning slips relating to "To Do Lists" (one to Stephanie Ybarra in September 1991, and two to John Roa, in March and August 1991). However, the attachment A "Summary" reveals that another organizer, Frank Streeter, had gotten a warning slip in March 1993 for "not turning in his to do list on time."

¹⁰⁵ Id. Exh. A.

ganizers] are achieving their goals,” and then asked the group, “What’s the problem?” In reply, organizer Barragan “criticized the administration’s inability to forge a team and [said that] the Local lacked an infrastructure . . . and cited an example in our lack of participation in the UCLA Chicano studies issue[.] . . . and stated that ideas are not being generated, and enthusiasm was a big problem[.] . . . and there were divisions among organizers, and the quality of the list was bad.”¹¹⁰ Cadorna retorted that “‘team’ and ‘effort’ comes [sic] hand in hand[.]” and went on to laud McFadden for having “always advocated that the staff have the freedom to try other methods to organize the workers,” and concluded with the observation that it was “difficult to criticize [the administration] when no apparent efforts have been accomplished towards the goals that were established.” In the ensuing discussions, McFadden singled out organizer Rickman Jackson for special praise, as the “only organizer [who] has reached the goal 3 times within the [previous] 6 month period,” which caused organizer Agdaian to remind McFadden, that he, too had “accomplished his quota,” whereupon McFadden “apologized for [this] oversight.”

It was at about this point that Marroquin, too, “expressed his frustration,” saying that he was,

ready to quit[,] and that picking up cards was frustrating[, and] that he had lost trust and confidence that a good working relationship could be established.

After further discussion, Stewart announced a “[group] recruitment goal of 1100 new members by the end of July 1993[.]” and “challenged the organizers to come up with a proposal based on their idea of a team concept[.]” He further “clarified that David Freeland is the day to day supervisor, Wilma Cadorna is the Staff Director, and Ophelia McFadden is the General Manager[, and he] directed staff to operate within the structure of the administration.”

Marroquin admits saying on June 9 that he was “ready to quit,” and that he had “lost trust and confidence” in the possibility of a “good working relationship” (apparently referring to the relationship between management and the organizers). He further admits, more generally, that he had “lost enthusiasm” for his work in the 2 months before his discharge. But elsewhere, he implied that his loss of enthusiasm only began after he started to get corrective memos, indeed, that this “constant counsel[ing] and attention and all of that” was what was making it difficult for him to “keep on going and producing at the same level that I was producing before[.]”¹¹¹ Marroquin’s implication that his enthusiasm began to deflate only after he started getting writeups from the Respondent (an implication which the General Counsel seems to embrace on brief¹¹²) is clearly contrary to the

record, for Marroquin’s statements in the June 9 meeting show that more than 2 weeks before he received his first corrective memo, he had already become rather severely demoralized. Moreover, I deem it significant that Marroquin seemingly conceded in the course of offering this cart-before-the-horse version of events that “his ‘produc[tion]’ did, in fact suffer during the period in question, compared to ‘the levels that [he] was producing before.’”¹¹³

With these general findings and observations behind me, I will now focus on the particulars of Respondent’s actions against Marroquin, and will supplement my findings with additional observations pertinent to my ultimate disposition.

b. The memos; Marroquin’s eventual dismissal

(1) June 28 memos

On June 28, Marroquin received three memos from Freeland, each written the same day. They memorialized facts relating to Marroquin’s recent performance. None of these was explicitly critical, but in context, each memo was admittedly understood by Marroquin as a “warning” of a sort, and reasonably so, because, until that point, Marroquin’s supervisors had not troubled to memorialize any problems they might be having with his work.

In one memo, captioned “Car Trouble,” Freeland “document[ed]” the (undisputed) fact that Marroquin had called Freeland on June 24 at 5:15 p.m. to report that his car was overheating, and therefore, he wouldn’t be able to return to work for the roughly 2-1/2 hours remaining in the scheduled work day. Freeland similarly documented the (undisputed) fact that Marroquin had told Freeland the next morning that he was now using his wife’s car, and that a mechanic was installing a replacement water pump on his regular car.

This was not the first time that Marroquin had missed work due to car troubles; he recalled as many as “five” previous absences for this reason. Although Marroquin’s testimony does not reveal the timing of these previous absences, everyone agrees that in late 1992, McFadden had authorized

¹¹³ Cadorna makes a similar claim, that Marroquin had been, at best, a “marginal” producer in earlier months of his employment, and became even worse in the June–July period. The Respondent sought to buttress Cadorna by introducing a chart (R. Exh. 32) showing each organizer’s “productivity” in the period January 1 to August 23. I received the chart into evidence under the “summary” rule (Rule 1006, *Federal Rules of Evidence*), after the Respondent laid appropriate foundation through Cadorna. However, this chart is relatively valueless for present purposes, because it only shows each organizers’ weekly “average” during the entire 8-month period, and thus does not permit a comparison of Marroquin’s production between, say, the April–May period, and the June–July period.[*] Nevertheless, Marroquin’s concession must be regarded as tending to corroborate Cadorna’s conclusionary assertion that his production was suffering in June–July.

[*] On brief (p. 23, fn. 22), the General Counsel invites me now to “reject” R. Exh. 32, or alternatively, to give it “little, if any weight.” In his arguments in support of these alternative claims (*ibid*), the General Counsel betrays a rather severe misunderstanding not only of the “conditions” under which I received the exhibit (see Tr. 901), but as well, of the foundational particulars that preceded the receipt of the exhibit. However, because of the exhibit’s limitations, I will not ascribe any probative significance to the information in the exhibit.

¹¹⁰ “The list” referred to here was a computer-generated list of names and telephone numbers and addresses of homecare workers who were not already members of the Respondent; that is, it was what both the Respondent and more typical telemarketing operations use when they make “cold calls.” And as Marroquin essentially confirmed, when Barragan objected that the “quality of the list was bad,” he was complaining, as phone salespeople are wont to do when criticized for not meeting quotas, that the list was “stale,” i.e., full of names of people who had been previously contacted, and who should no longer be treated as potential “prospects” for recruitment.

¹¹¹ Tr. 583:5–10.

¹¹² G.C. Br. 26.

a \$1000 loan to Marroquin to get his car into decent running order. I therefore infer that at least some of his previous absences, perhaps all of them, had occurred before McFadden granted the loan. And given this background, I do not find it inherently suspicious that Freeland troubled to "document" this most recent occasion for Marroquin's absence, especially considering that Marroquin had by then vocalized his loss of enthusiasm for the job, indeed, his "read[iness] to quit." And unlike the General Counsel, I am not persuaded to a contrary conclusion simply because organizer Rickman Jackson apparently once had to work from home due to car troubles, but was never written-up for this.¹¹⁴

In a second memo, captioned, "Report on Community Outreach," Freeland "remind[ed]" Marroquin that Freeland had asked him "last Thursday" (i.e., June 24) for a "brief report" on his June 23 visit to a "community center at Pico and Magnolia." Marroquin admittedly had not turned in such a report as of June 28; he said that he did not "remember" Freeland having made such a request on June 24. But he appears not to have placed much priority on completing the task even after he was "reminded" to do it on June 28, for he admittedly waited until a "couple of days after [he] received this [June 28] memo" before furnishing such a report to Freeland.

In a third memo, captioned "Tally Sheets," Freeland advised Marroquin that he had not yet turned in his tally sheets for the organizing calls he had made on the evening of June 21 and the morning of June 24. Marroquin admittedly had not turned-in these sheets by June 28; and he again admittedly waited another "couple of days after that [date]" before submitting these tallies to Freeland. He could not explain his delays when questioned about them on cross-examination, but his implicit explanation when questioned by the General Counsel on redirect examination was that Freeland had never told him that there was any "urgen[cy]" about submitting them.

Marroquin's "no urgency" explanation was the product of suggestive questioning by the General Counsel,¹¹⁵ who now repeats this explanation on brief.¹¹⁶ I think the explanation proffered here by the prosecutor involves a certain obtuseness, if not coyness. I think a reasonable person would have seen (and that Marroquin did, in fact, see) that Freeland's memo was itself intended to impart to Marroquin the "urgency" of promptly submitting the overdue tally sheets.¹¹⁷ Therefore, when Marroquin's waited "a couple of days"

after June 28 before finally submitting the tally sheets in question, and as well, the overdue "Community Outreach" report, I find it quite plausible that his supervisors would take his foot-dragging as manifestations of his admitted loss of enthusiasm for the job and its demands, and further, as an implicit sign that he was unwilling to cooperate with the program, i.e., that he was "insubordinate."

Cadorna admits that she authorized Freeland to write these memos, but she denied that she had instructed Freeland to issue three separate memos to Marroquin; indeed, she acknowledges that he might have more easily chosen simply to incorporate all of his current concerns into a single memo. As to why Freeland did not follow the latter approach, Cadorna recalled that Freeland had come to her at different times of the day on June 28 to report his various "concerns" about Marroquin's performance, and that each time he did so, Cadorna advised him to write a memo about them; therefore, she assumed that Freeland's piecemeal approach to the memos was simply the result of his piecemeal approaches to Cadorna. Because Freeland did not testify, I would not rely on Cadorna's speculations as to why Freeland wrote three memos, rather than a single one. But neither would I adopt the darker interpretation of this "three-memo" phenomenon that the General Counsel urges in his brief as a necessary conclusion ("Thus, it follows that Respondent was starting an accelerated progressive disciplinary scheme to rid itself of one of the most outspoken organizers in the office.") For it is clear that the Respondent did not seize on the existence of these "three written warnings" to fire Marroquin outright, even though they might have been enough under the Respondent's "progressive disciplinary system" to superficially justify his dismissal.¹¹⁸ And it is equally clear that Marroquin's dismissal was not "accelerated" by virtue of his having received three memos, rather than a single one; instead, several more weeks would pass, and several more memos would issue, before the Respondent would actually fire Marroquin.

(2) July 12 "To Do List" memo

Freeland had left the Respondent's program in early July to do work in San Bernardino. Cadorna had then taken over direct supervision of the organizers. On July 12, Cadorna wrote a memo to Marroquin that purported to summarize her meeting with him that day, a summary which Marroquin generally agrees was accurate. In the July 12 memo, Cadorna confirmed that she had met with and criticized Marroquin for submitting "To Do lists" that were lacking in "specifics as to your actual daily work plan and activities." She further emphasized that she intended to "make sure that the plan developed by the staff organizers to reach the 1100 recruitment goal is followed through and implemented[.]" and that "[t]his will be the basis to evaluate your capacity to build your team and follow through with the tasks that everyone including yourself has agreed to do." Finally, she had warned him that she would be the one in the future who would "evaluate [his] daily work plan" and would "expect the results of [his] activities on a daily basis."

¹¹⁴ On brief (pp. 19, 63), the General Counsel cites as evidence that Marroquin was the victim of disparate treatment here, a "To Do" list Jackson apparently submitted on July 2, on which he had accounted for his July 1 activities by entering the words, "Car Trouble—Phone banked from home." The General Counsel finds it significant that "Jackson was not disciplined in writing for his car trouble." I do not find the situations comparable: Jackson was not shown to have "missed" any work as a consequence of his own car troubles on July 1; neither was he shown to have had a history of previous car troubles comparable to Marroquin's; neither, so far as this record shows, had Jackson ever previously proclaimed that he was "ready to quit." Moreover, it appears that Jackson, unlike Marroquin, was among the Respondent's top "producers," and this alone might explain why his having worked at home one day due to car problems did not arouse his supervisors' concern.

¹¹⁵ Tr. 615:2-8.

¹¹⁶ Id., p. 20.

¹¹⁷ Marroquin appears to admit as much at Tr. 610:7-11.

¹¹⁸ Here, I recall Cadorna's January memo to the organizers, which had closed with the admonition, "Three (3) writeups will be cause for termination."

Cadorna issued nearly identical memos the same day to organizers Agdaian, Barragan, and Streeter. Explaining her reason for including Marroquin as a target for such a memo, Cadorna testified that Marroquin had recently submitted a To Do list that contained only his name and the notation, "PB," meaning "Phone Bank," which caused her to tell him during their meeting that she was "surprised that he would turn in something like that to me." She recalled further that even though she had "left a lot of openings [for Marroquin] to give [her] an explanation," he was not "interactive" during this session; instead, "[h]e just shrugged his shoulders and he said, 'I'll just do another one.'" Marroquin does not contest any of this. In the circumstances, I cannot find that Cadorna's explanation for issuing such a memo to Marroquin was merely pretextuous. Indeed, I find it quite plausible that Cadorna would interpret Marroquin's having submitted a superficial work plan, and his shrugging reaction to her criticisms of it, as further signs of his flagging enthusiasm and indifference to supervisory efforts to get him to shape up.

(3) July 16 "Final Warning" sessions and their antecedents

As I will elaborate below, the events of Friday, July 16 involved three distinct "meetings": First, Cadorna met with Marroquin in a private corrective session; next, Cadorna went to McFadden and announced that she had "had it" with Marroquin, and intended to fire him right now, a statement that caused McFadden immediately to instruct Cadorna that she would do no such thing; and next, McFadden and Cadorna met directly with Marroquin for a "final warning" session, a session that Stewart joined, at McFadden's suggestion. These events—especially those in the latter meeting—were summarized in a "Final Warning on Work Performance" memo written by Cadorna and delivered to Marroquin later that day. The memo is lengthy, and much of it is couched in summary terms, but its significance could not have been lost on Marroquin, for at its conclusion, Cadorna had written,

You have until the end of July to change your attitude, get on with the program, and apply the skills that you have learned as an experienced union organizer. If within the next two and a half weeks, nothing has changed, you will be terminated.

The background associated with Marroquin's "Final Warning" deserves attention, but it is not easy to narrate, because much of it is sketchy. Cadorna's testimony, not a model of clarity, is nevertheless the most comprehensive one, and Marroquin does not appear to deny any of the elements in Cadorna's testimony that refer to the face-to-face transactions with Marroquin that day. Moreover, McFadden and Stewart's more fragmentary testimony tends to corroborate Cadorna about those events in which they participated. Accordingly, I rely chiefly on Cadorna for findings below about her own initial meeting with Marroquin alone, and I rely on a blending of the harmonious features of Cadorna's, Stewart's, Marroquin's, and McFadden's recollections for findings about what happened in the ensuing meetings.

About 10 a.m., Cadorna called Marroquin into an office, where she then "expressed [her] frustration because, again, after receiving a memo regarding submitting his work plan

and being specific, just the next day and the following day thereafter [Marroquin] continued to function in the same manner as if nothing was ever raised with him as an issue." (Although it is not certain what Cadorna was referring to here, it appears from the "Final Warning" memo that Cadorna prepared later that day that she was charging specifically that, notwithstanding Cadorna's July 12 memo, Marroquin had not turned in a "work plan" *in advance* of his activities on July 13 or July 14.¹¹⁹) In any case, Cadorna testified that in a "frank discussion" that followed her introductory expressions of frustration, Marroquin repeatedly confessed his disenchantment with the job, remarking variously that coming to the office was making him "sick," and that he felt "frustrated," and that he no longer had "passion" for his work. Eventually, Cadorna "dismissed" Marroquin from her office, saying as she did so, "I'm going to speak to Ophelia McFadden and make a recommendation for your termination, Julio." Marroquin merely "shrugged his shoulders and went back to his desk."

Cadorna then went to McFadden's office and told her that she had "had it with Julio," and intended to fire him. In this regard, she told McFadden that Marroquin's "interest is just not in the work, and we can't move a program when an organizer is just not with it." McFadden countermanded this and instructed Cadorna instead to bring Marroquin back into her office, telling Cadorna that she also wanted to bring in Stewart, in the hope that his presence might have a positive effect on Marroquin's attitude. (McFadden separately explained that she felt that Marroquin "may have had a problem with [a] female supervising him," and therefore wanted Stewart involved, because he was a "man," who might be able to "have a man to man conversation with [Marroquin] in our presence and this maybe would help him.")

Marroquin and Stewart were then summoned to McFadden's office, where they joined Cadorna and McFad-

¹¹⁹ Thus, in the "Final Warning" memo (R. Exh. 17), Cadorna specifically charged that Marroquin had not submitted a "work plan" on "Tuesday, July 13," and that when she checked again on "Wednesday, July 14, at the end of the day," Marroquin's work plan still had not been submitted, even though all the other organizers had submitted theirs. However, Marroquin testified summarily (Tr. 595:22-596:7) that he had, in fact, submitted work plans "on" the following dates: July 12-16 and 19-20. And his work plans bearing those date entries (in Marroquin's handwriting) were received into evidence (G.C. Exhs. 26-32) without objection. Despite this evidence, which seemingly contradicts assertions in Cadorna's memo, I retain substantial doubt that Marroquin submitted those work plans on the dates he said he did. For one thing, each time the General Counsel asked him if he had submitted a work plan "on" a certain date, Marroquin answered, "Yes," in automatic tones, and without further particularization. For another, the exhibits just mentioned, unlike many other work plans introduced by the General Counsel, contain no entry reflecting *when* Marroquin's supervisor supposedly received or reviewed them, nor any other entries indicating that a supervisor had, in fact, received them. Moreover, on brief, the General Counsel does not challenge Cadorna's recorded assertions about Marroquin's missing work plans; rather, he argues (unpersuasively) that Marroquin was again the victim here of disparate treatment. In all the circumstances, while I confess that I remain doubtful about the accuracy of Cadorna's recorded assertions about missing work plans, I would not find that those assertions were simply false, for I remain equally doubtful as to the actual timing of Marroquin's submission of work plans in the period July 12 through 20.

den.¹²⁰ During the meeting that followed, Cadorna complained about Marroquin's poor attitude, and his failure to complete and promptly submit the paperwork required of all the other organizers. McFadden asked Marroquin "what was wrong." Marroquin replied (crediting Cadorna here, whose account is echoed in part by each of the other participants) that "he didn't like what was happening in the office," and had "lost interest," and "really didn't like to do this work anymore." (In this latter regard, it appears that Marroquin also explained that developments in the office associated with the Union's campaign had soured him on his job.¹²¹) Crediting Cadorna, McFadden replied that she saw Marroquin as still having "a lot of potential," but that "we needed to put a lot of things behind us," and asked him if he "felt" that he could "put it behind him and move forward with the program."¹²² According to Cadorna, Marroquin eventually appeared to respond "positively" to the others' exhortations to achieve a turnaround in his attitude and performance. But as I have previously found, the meeting ended with an unmistakable warning to Marroquin that he must improve quickly or face dismissal.

(4) July 19 session and memo

On Monday, July 19, Cadorna issued another memo, this one addressed to both Marroquin and his then work partner, Agdaian. There, Cadorna again purported to summarize a meeting that day with those organizers in which she had reiterated the need for "daily work plans" from them which "must reflect and substantiate how [they] intend to spend [their time] organizing homecare workers," and in which she made certain suggestions as to how they might most profitably direct their efforts. Marroquin admits that Cadorna had communicated such instructions to him and Agdaian during the meeting that had preceded the memo.

¹²⁰ Marroquin uniquely testified that Stewart did not join the meeting until some midpoint. Cadorna and Stewart testified that Stewart was present throughout the meeting. I regard this conflict as unimportant, and I will not decide who was right.

¹²¹ Although no one distinctly so testified, Cadorna's "Final Warning" memo recites that Marroquin explained that his loss of "enthusiasm" stemmed "from the gossiping and intrigues in the office . . . [including] threats that people were going to do bad things to the Union." Because this is roughly consistent with Marroquin's own testimonial explanations for his admitted loss of enthusiasm, I find it likely that he said what Cadorna quoted him in the memo as saying.

¹²² Marroquin separately recalled that at some point he accused McFadden, in substance, of picking on him because of his union activities, and that McFadden stated in this connection (as Marroquin recalled in his most deliberate recollection), that "[t]he only skills that you have shown is that you are good at organizing the staff here, but not organizing homecare workers." I find it likely that McFadden made some such remark, quite probably in connection with her statement that Marroquin had a "lot of potential." But for reasons I have noted previously, I would not treat such a statement as either an "impression of surveillance" violation nor as an unlawfully coercive "instruction" that Marroquin must cease his organizing efforts for the Union. Rather, in context, I judge that Marroquin would have apprehended that remark simply as an exhortation to apply those same *internal* "organizing skills" to the job he was being paid to do. (And I note further in this regard that the complaint does not allege that McFadden made any unlawful statement during the July 16 meeting with Marroquin.)

The Respondent has offered no distinct evidence that Marroquin had committed any further performance infractions that might have triggered this memo; I assume that he had not, considering especially that a weekend had intervened between the "Final Warning" memo and the memo now in question. Rather, I interpret the July 19 memo as a kind of "follow-up" exercise on Cadorna's part, intended to impress on Marroquin, especially, that she would be watching him closely from now on.

(5) July 20 memo

Cadorna arrived at work on the morning of July 20 at about 10:30 a.m. She soon discovered that Marroquin was absent, and that he had not yet turned-in a work plan for the day.¹²³ Because she had no work plan for Marroquin, and therefore had no idea where he might be or what he might be doing, Cadorna instructed Fregoso to call Marroquin through the pager device he wore. When Marroquin got the page, he called the office and explained to either Fregoso or to Cadorna (or perhaps to both) that he was being held up because of another problem with his car. When he arrived at work later, Cadorna gave him another memo, which she had prepared in the interval; in this memo, she said:

After several discussions with you, followed with memos, you still have not submitted a work plan today. You were here last night until 8:00 p.m. I have repeatedly advised you to write a work plan before leaving in the evening. This is [a] final warning. The next incident will constitute [sic] immediate termination.

You will also be docked for the 2-1/2 hours on the morning of July 20 for failure to appear because you have car problems. I have no messages or work plan from you on my desk when I arrived in the office at 10:30 a.m. Instead, I had Josie Fregoso page you. Josie mentioned that you called in but did not know when you are expected to be in.

Marroquin does not contest any of the assertions in this memo. Moreover, Marroquin admits (notwithstanding a possibly contrary interpretation of the last sentence in Cadorna's memo) that he had not called-in to say he would be late when he first encountered car problems; rather, he admits that it was only after he was paged by Fregoso that he called back and then reported his situation.¹²⁴ On brief, the General Counsel dismisses Marroquin's absence, and his failure to call-in before being paged as "isolated" incidents.¹²⁵ And as to Marroquin's failure to have submitted his work plan before leaving the office the previous evening, the prosecutor argues that Cadorna was "applying a different standard to

¹²³ As I have previously noted, Marroquin testified that he did, in fact turn in a work plan for his July 20 activities (purportedly, G.C. Exh. 32), and that he did so "on" July 20. However, because of my earlier noted doubts about at least the *timing* of Marroquin's submission of this work plan, I would credit Cadorna that Marroquin had not submitted such a plan by 10:30 a.m. on July 20.

¹²⁴ Tr. 568:7-16. (Incidentally, considering Marroquin's admission, I would interpret the last sentence of Cadorna's memo as reflecting information she got from Fregoso *after* Marroquin had returned the page, and possibly before Cadorna got on the phone to hear his explanation for his absence.)

¹²⁵ G.C. Br. 68.

Marroquin as to the timing of the submission of his "To Do Lists," in that she was requiring him to submit his work plan on the eve of the next day's activities, whereas she more typically allowed other organizers to submit their work plans the "first thing in the morning" of the day of their planned activities. Moreover, the General Counsel argues that where Marroquin was unavoidably delayed by his car troubles that morning, it was unreasonable—and evidence of unlawful discrimination—for Cadorna to have written this memo without waiting for Marroquin to get to the office, and without then giving him a further "opportunity" to prepare and submit his work plan for the day.¹²⁶

These arguments again strike me as obtuse. While the record would allow a finding that Cadorna tolerated it when organizers would sometimes wait until their morning arrivals at the office to fill out their To Do lists for the day, this is a relatively trivial fact, because it ignores that by July 20, Marroquin occupied a rather distinct status, as the only organizer who by then had received an unmistakable "final warning" and a threat of termination for failure to demonstrate quick improvement. Neither had any of the other organizers told their supervisors that coming to work was making them "sick," or that they intended to "quit." Thus, I don't find it surprising, much less evidence of *unlawful* disparity in treatment that Cadorna, after July 16, was holding Marroquin to a perhaps stricter "standard as to the timing of the submission of his "To Do Lists." Neither is it surprising, considering Marroquin's recent statement that coming to work was making him "sick," and that he "really didn't like to do this work anymore," that Cadorna would become especially exercised when neither Marroquin nor his work plan could be found when she arrived at the office at 10:30 a.m. on July 20. And again, I think the General Counsel goes beyond obtuseness into the realm of coyness when he attacks Cadorna for failing to give Marroquin the "opportunity" to submit a work plan for July 20 before writing the above memo. For this latter argument ignores Cadorna's testimony that Marroquin did not submit a work plan even after he arrived at work on July 20, and that indeed, he did not submit one the *next* morning either.¹²⁷

(6) July 21 termination

Cadorna fired Marroquin the next morning. The gist of her explanation is that, even though she saw Marroquin's defaults on July 20 as indications of his "incorrigib[ility]" and hopelessly "insubordinate" attitude, she nevertheless withheld acting on these assessments that day, hoping that he might come across with his tardy work plan sometime later that day. (In this regard, Cadorna affirmed that if Marroquin had done so, he could have "skated" a little while longer at least.) But when Marroquin still had not submitted a work plan the next morning, Cadorna says that she became satisfied that she must act on her July 20 judgments, and therefore she wrote a termination memo, which concluded with these sentences:

After nine (9) months of employment, it is evident that you do not have the desire to succeed, and we can ill afford to retain you.

You are hereby terminated as of today. You can pick up your check today at 4 p.m.¹²⁸

After composing this memo, Cadorna showed it to McFadden. This time, McFadden did not oppose her decision. With the way thus cleared, Cadorna then summoned Marroquin, handed him her memo, and told him he was through.

I am not fully persuaded by Cadorna's rather uneven explanations of why she did not simply fire Marroquin on July 20, but waited until the next day to do so. However, I am satisfied that Marroquin's failure to have submitted a July 20 work plan before leaving work on July 19, joined to his non-appearance on the morning of July 20, would alone be enough to have reasonably caused Cadorna to judge that Marroquin was beyond redemption. Therefore, my doubts about the precise reasons why Marroquin was not fired until July 21 would not alter my overall judgment that by the time he was fired, Marroquin had clearly demonstrated a kind of defeatism and indifference to the strict probationary terms under which he was then working that would plausibly account for his dismissal.¹²⁹

b. Concluding discussion

A central contention in the Respondent's defense to all of its actions against Marroquin is that each was prompted by Marroquin's steadily worsening "attitude" toward his job, and his continuing unwillingness to follow directions from his supervisors that were intended to get him to achieve a "turnaround." The evidence summarized thus far lends much substance to this defense: Thus, Marroquin admits that he had lost "enthusiasm" or "passion" for his work during the period in question, and that he confessed those feelings to his supervisors in vivid terms during meetings near the beginning of this period and near the end of it. In addition, Marroquin has admitted in general terms that his "performance" was suffering during that same period.

Moreover, insofar as the General has claimed that Marroquin's emergence in late May as a union supporter was what caused the Respondent to concoct a scheme to fire him as soon as his personnel file could be larded with enough "warnings," such a claim is severely hampered by an obvious counter-explanation for the Respondent's issuance of these memos—Marroquin's announcement on June 9 of his disposition to "quit," and of his loss of "trust and confidence" in the possibility of a "good working relationship." For those statements alone reasonably might have been expected to trigger closer scrutiny of his performance thereafter, and to have brought about the very "constant

¹²⁶ Id. at 25, fn. 24; p. 26.

¹²⁷ Tr. 890:19–892:8. And again, although Marroquin testified summarily that he *did* submit work plans "on," respectively, July 19 and 20 (purportedly, G.C. Exhs. 31 and 32), I doubt him as to the timing of his submission of those work plans.

¹²⁸ The balance of the memo is couched in similarly conclusionary terms, and amounts to a rehashing of previous criticisms leveled against Marroquin.

¹²⁹ Moreover, even if Cadorna testified inaccurately when she said that Marroquin had not submitted a work plan at all on July 20, nor on the morning of July 21, such inaccuracies would not be enough to cause me to reinterpret all of the Respondent's preceding actions against Marroquin as merely sham behavior, participated in variously by Freeland, Cadorna, McFadden, and Stewart, to camouflage a mutual scheme from the beginning to get rid of Marroquin because of his union activities.

counsel[ing] and attention” that Marroquin unconvincingly blamed for his increasingly reduced enthusiasm and ability to “produce.”¹³⁰ And although the record does not clearly show this, it at least contains threads of support for the General Counsel’s claim that Freeland and Cadorna began on and after June 28 to watch Marroquin more closely, and to judge his work with an increasingly skeptical eye. But even if this is true, I think such management attentions are more easily explained on this record as products of Marroquin’s own self-damning declarations of his profound dissatisfaction with his job than as acts done in implementation of a supposed scheme to get rid of Marroquin because of his support for the Union.

In reaching this latter judgment, which emphasizes Marroquin’s declarations at the June 9 meeting as a plausible and innocent explanation for the Respondent’s critical attention to his work after that date, I am especially influenced by the unique characteristics of the Respondent’s business operation and of Marroquin’s role within it. On this record, the Respondent’s “organizing” business is hard to distinguish from that of any commercial sales operation that uses telemarketing to generate customer “leads,” and home visits to “close” the sale. And although the analogy between the organizers’ jobs and the jobs of commercial telemarketing salespeople does not hold up in all of its particulars,¹³¹ I nevertheless regard it as an apt one—especially when it comes to understanding the likely standards that the Respondent would expect the organizers to meet, and the kinds of performance or “attitude” problems that might likely arouse the concern of an employer running an operation like the Respondent’s. Pursuing this reasoning, I return to the events in the June 9 meeting, which again reveal parallels with events that might be expected to transpire in a hypothetical meeting conducted at a critical phase of a high-stakes sales campaign. Thus, Stewart (the “national sales director” for purposes of analogy) combined exhortations to the organizers to produce “results” with veiled threats that their failure could cause the party subsidizing the campaign to withdraw from further investment in the campaign, an action that would surely doom the jobs of the organizers. Predictably, at least one organizer, Barragan, reacted as salespeople often do in such settings, by pointing fingers of blame in other directions. However, Barragan’s reactions seem to have been expressed rather cautiously, and were balanced with arguably “constructive” suggestions, perhaps out of a recognition that “positive attitude,” and “team spirit” are qualities that are indispensable to an organizer/salesperson’s effectiveness and value to the employer. And it is with this latter point in mind that I judge that Marroquin’s remarks at the June 9 meeting—especially his statement that he was “ready to quit”—

were uniquely self-destructive, in that they would likely arouse strong doubt in his supervisors’ minds about his further value to the program.¹³²

Thus, I find it plausible that first Freeland, and later Cadorna, who themselves operated under especially intense pressure in late June and thereafter to prod the organizers and get results from them, would have fixed on Marroquin’s uniquely expressed disgruntlement as a major obstacle, even a threat, to their personal success in performing their functions as “sales supervisors,” and would have behaved as they did towards Marroquin for those reasons alone. And especially after Freeland’s departure made Cadorna directly responsible for the organizers’ performance, I do not find it remarkable that she would try to insulate herself from potential criticism from above by perhaps more zealously “documenting” her critiques of and warnings to Marroquin.¹³³ Moreover, with Cadorna’s own job to some extent riding on her ability to get results from the organizers in the form of 1100 new members by the end of July, and with Marroquin as the most visibly “negative” force she would have to overcome to ensure that this quota was met, I find it likely that even small or indistinct infractions by Marroquin would have taken on greater significance to Cadorna, especially when he combined them with an ongoing, shrugging indifference to Cadorna’s verbal and written criticisms. And considering that Marroquin admittedly complained to Cadorna on July 16 that coming to work was making him sick, I regard it as probable that this alone—apart from whatever particular problem or problems had caused Cadorna to meet with Marroquin that day—would have caused Cadorna to judge that it would be

¹³² In *Pacesetter Corp.*, 307 NLRB 514 (1992), involving a telemarketing operation and other circumstances that I regard as closely analogous to those presented in this case, the Board approved my finding that the employer did not violate the Act by firing Iwerson, a phone salesman who was the leading in-house organizer in a union drive during which the employer had committed many violations of Sec. 8(a)(1). I judged (id. at 522) that Iwerson’s “[recently] announced decision to locate another job, coupled to his recent performance decline . . . genuinely and alone formed the basis for [the employer’s] decision to fire him.” On the same page I noted that “enthusiasm” was a sine qua non of Iwerson’s job, and that “employers of such salespersons are quick to fire sales personnel who do not consistently carry their own weight in the organization, and particularly so when they no longer show any real enthusiasm for the job, such as by complaining that they aren’t earning enough, and intend to seek work elsewhere.”

¹³³ Again, considering Marroquin’s unique circumstances, I do not find it significant that the General Counsel has been able to cite (G.C. Br. 21, fns. 19, 20) a few examples arguably showing that certain other organizers were occasionally being treated more leniently when it came to their performance of paperwork duties in the June–July period.

The General Counsel’s claim of “disparate treatment” derives mainly from Cadorna’s admissions or near-admissions that certain To Do lists completed by other organizers were in some way “incomplete,” but that she nevertheless did not call these organizers in for special warnings or write them up for such derelictions. I note that the list of organizers whose defaults were thus arguably “tolerated” by Cadorna included some who were visibly identified with the Union’s cause, such as Rudy Barragan and Aram Agdaian. And this strongly suggests that whatever “disparity” in treatment was going on as between Marroquin and other organizers was influenced by considerations that had nothing to do with their respective attitudes towards the Union.

¹³⁰ I have already noted that in blaming his reduced enthusiasm and performance on the Respondent’s “constant counsel[ing] and attention,” Marroquin to some extent has put the cart before the horse, for his June 9 statements betray that his demoralization had begun well before June 28.

¹³¹ Thus, unlike persons who use the telephone and followup visits to generate sales of, say, insurance, or bonds, or aluminum siding, the Respondent’s organizers do not receive any “commissions” when they sign up a new member on checkoff. Rather, they receive a flat salary, one that is heavily subsidized by SEIU, which, through Stewart, establishes the goals and quotas they are expected to satisfy to justify SEIU’s subsidies of their pay.

futile to try to coax any further improvement from Marroquin, and for that reason, to have recommended his dismissal to McFadden. And finally, although McFadden had insisted on July 16 that Marroquin be given a “man-to-man” pep talk by Stewart, and then a “final” chance to improve himself, it could be expected that Cadorna, in the period July 16–21, would require little in the way of further evidence of Marroquin’s incorrigibility before she would return to McFadden, as she did on July 21, with an even more vigorous recommendation to fire Marroquin. Thus, I judge it likely that when Cadorna could find neither Marroquin nor his work plan when she arrived at the office on July 20, and then was forced to page Marroquin to determine that he was again claiming car troubles as his excuse, she, and in turn, McFadden would find in those circumstances sufficient reason to judge that the Respondent could no longer “afford to retain” him.

I thus conclude as a matter of law that the Respondent committed no violations of the Act by issuing writeups to Marroquin or by discharging him, and I will therefore dismiss all counts in the complaint that allege to the contrary.

2. Mynatt

In his midtrial amendments to the complaint, the General Counsel now charges that the Respondent committed acts of unlawful discrimination under Section 8(a)(3) when it issued three corrective memos to Mynatt in June, when it extended her probationary period on August 24, and when it issued three additional corrective memos to her in November. The General Counsel has further alleged that the November warnings were intended to punish Mynatt for having given testimony for the prosecution, and therefore, that each of them violated Section 8(a)(4). For reasons I explain below, I judge that the General Counsel has not established a *prima facie* case that unlawful motives tainted any of the actions taken against Mynatt that are now in question. This judgment would make it unnecessary to examine the facts surrounding Mynatt’s treatment in greater detail. However, to avoid delays that would inevitably result if a reviewing body were to disagree with this threshold judgment and then remand the case, I will also review the details more closely, and will analyze them for the most part as if the General Counsel had satisfied the prosecution’s burden of persuasion that unlawful motives figured in the Respondent’s actions against Mynatt. I will nevertheless conclude that the Respondent met its rebuttal burden under *Wright Line* of “demonstrating” that it would have taken the same actions without regard to Mynatt’s association with the Union, or her having testified for the prosecution.

As I have found, Mynatt’s working relationship with McFadden and other of her supervisors had already become rather severely strained in early March, during Mynatt’s first month on the job, and well before the Union’s appearance on the scene. Thus, Mynatt admits that in an early March argument with McFadden, she had defiantly challenged McFadden’s authority over her, and had tauntingly declared to McFadden, in substance, that she was responsible only to Stewart. And during the same early March period, she had further irritated both Freeland and McFadden by appealing to SEIU for a loan to attend her brother’s funeral, after having been turned-down at the local level. Then, thwarted in this request, she had filed and maintained a claim for 3 days’ be-

reavement pay, but had dodged Freeland’s efforts, first recorded in a March 16 memo, to get her to document that she had, in fact, traveled to the funeral, which, in fact, she had not done. I have further explained why I do not believe Mynatt’s testimony about certain supposed one-on-one conversations with McFadden, and why, more generally, I would not accept her word alone on any contested matter. In addition, I have explained why I do not believe her various claims that she had become associated with the Union’s cause in June. Finally, I have noted that the only credible evidence that might be relied on to establish that the Respondent’s agents ever perceived Mynatt as a Union supporter is the fact that she was one of several organizers who received subpoenas from the Union on July 19.

In the light of these findings, I judge first that the General Counsel failed to establish a *prima facie* case that unlawful motives tainted Freeland’s issuance to Mynatt of the three memos in June, for even assuming, *arguendo*, that Mynatt had somehow begun to identify with the Union’s cause in June, there is no credible evidence that the Respondent knew of this in June. I judge further that, even though the Respondent knew on July 19 that Mynatt had gotten a subpoena from the Union, and then extended Mynatt’s probationary period on August 24, this set of facts would establish only the most tenuous and empirically dubious basis for a finding that the former influenced the latter.¹³⁴ And it obviously becomes even more dubious as an empirical matter to suppose that her receipt of the subpoena in July somehow was a motivating factor in the Respondent’s issuance to her of the three *additional* warnings in November. Moreover, for essentially similar reasons, I judge that the mere fact that Mynatt’s testimony preceded her receipt of three warnings in November was not enough to warrant an inference that the former was a motivating factor in the latter. Accordingly, I would dismiss all of the 8(a)(3) and (4) attacks on the Respondent’s treatment of Mynatt for want of a *prima facie* case.

However, I will describe in the next section the circumstances surrounding each of the warnings Mynatt received, and will explain my alternative judgment that the Respondent would have issued them in any case, for reasons that do not implicate the Act.

a. June memos

It is central to the General Counsel’s theory of prosecution that McFadden’s resentment of Mynatt’s having “announced to McFadden . . . on May 26 that Mynatt supported the

¹³⁴ To judge that the General Counsel made out a *prima facie* case of unlawful discrimination in the extension of Mynatt’s probationary period, I would be required to borrow rather heavily on the evidence of the Respondent’s antiunion *animus* revealed in the period May 5–21, then presume, in the light of that *animus*, that when the Respondent learned on July 19 that Mynatt, among others, had been subpoenaed by the Union, Mynatt would become the likely target for retaliatory treatment, then presume further that *any* action taken against Mynatt thereafter by the Respondent was a manifestation of union-hostile retaliation against her. We know that post hoc, ergo propter hoc involves a logical fallacy, even though such reasoning may lead us to empirically valid results in given instances. Here, I think it pushes post hoc, ergo propter hoc beyond even its *empirical* limits to presume that the extension of Mynatt’s probationary status traced from the Respondent’s awareness that she was one of several organizers who had received a subpoena from the Union.

Union” was what caused the Respondent to issue three warnings to Mynatt in June.¹³⁵ However, I have already discredited Mynatt as to the supposed “May 26 meeting,” and this clearly dooms the General Counsel’s theory of violation. Nevertheless, because the Respondent’s warnings to Mynatt in June were again invoked when the Respondent extended her probation in August, by which time the Respondent admittedly knew at least that Mynatt had been subpoenaed by the Union, I will spell out the details associated with the “June warnings.”

(1) June 1 warning for failure to call in

On the evening of June 1, Freeland issued a memo to Mynatt captioned, “Written Warning.” In substance, the memo recapitulated Freeland’s personal remonstrations with Mynatt that same evening over her “fail[ure] to call the office once this morning and once this afternoon, concerning [her] status and progress in following [her] appointment schedule.” The memo noted further that Mynatt had failed to respond to five calls placed to her “beeper” (pager). It also recorded the excuses Mynatt had proffered to Freeland—that she had “forgotten to take [her] beeper with [her],” that she had “tried to call the office just after 8:00 a.m., but no one answered the phone[.]”¹³⁶ and that she was unable to make her afternoon call because she had by then “run out of coins for the pay phone.” (On this latter point, Freeland noted in his memo that he had told Mynatt she could have called “collect,” and that Mynatt had replied that it “hadn’t occurred to her to do this.”)

Mynatt admits most of the facts recited in Freeland’s memo, and she does not directly dispute any of them. Neither does she dispute that organizers were generally expected to make morning and afternoon “call-in” reports to the office. (It further appears to be undisputed, as Cadorna testified, that concern for the organizers’ safety while working in dangerous neighborhoods was one of the Respondent’s reasons for having the call-in requirement.) In addition, Mynatt’s admission that she had forgotten to take her beeper with her could be expected not to have assuaged, but to have aggravated Freeland’s irritation when he had been unable to page her to ascertain where she was and what she was doing. (On this latter point, Mynatt summarily testified that “we were not required to take beepers[.]” but she never offered a persuasive basis for such testimony,¹³⁷ and I don’t believe

her claim, which, in any case, missed the point that the matter of her beeper was seemingly incidental to the central criticism Freeland was making—that she had not herself initiated a call to the office to report her circumstances.) Moreover, Mynatt’s excuse that she had “run out of coins” was plainly a lame one, and would have been reasonably so perceived by Freeland, especially when she could have called the office “collect,” if “no coins” had been the only reason for her failure to call the office in the afternoon. (In this latter regard, Mynatt testified that she argued to Freeland that she had “learned in Seattle [that] it was against International By-Laws to call collect.” In fact, however, SEIU’s by-laws contain no such prohibition, and McFadden credibly testified that no such “policy” existed.) I am persuaded that when Mynatt admittedly argued with Freeland and offered quite implausible and inadequate excuses for failing to do something she knew she was supposed to do—call in to the office twice a day—she was simply giving the Respondent reasonable grounds for questioning her reliability and her amenability to supervision.

(2) June 11 warning concerning “Office Protocol”

Background: As I have found previously, Stewart had reminded all of the organizers during a staff meeting on June 9 that “David Freeland is the day to day supervisor, Wilma Cadorna is the Staff Director, and Ophelia McFadden is the General Manager,” and he had specifically “directed staff to operate within the structure of the administration.” Despite this, before work on the morning of June 10 or 11, Mynatt had called Stewart at his room in a Los Angeles-area Holiday Inn, to deliver herself of various gripes against her supervisors, especially McFadden, and to seek his support for certain claims she was then maintaining. One of the claims she raised with Stewart was Freeland’s and McFadden’s opposition to her request for 3 days’ pay to compensate her for 3 days she felt she should have been entitled to take off to grieve her brother’s passing in March. Another was McFadden’s opposition to a wholly separate claim Mynatt was also pressing, to be given a day’s pay in lieu of “compensatory leave,” to which she felt entitled because of some overtime work she had performed for SEIU while in Seattle in April and May. More generally, Mynatt admits that she complained to Stewart that McFadden “treats everybody horrible . . . and she walks on people . . . [a]nd . . . she treats us like dirt.” (Moreover, for reasons previously noted, it appears that by this point, Mynatt was further aggrieved over having been written-up by Stewart on June 1 for not “calling-in.”) Crediting harmonious elements in both Stewart’s and Mynatt’s accounts of this conversation, I find that Stewart reminded Mynatt that McFadden was her boss, and that she should show more respect to McFadden, and told Mynatt that he would not intervene concerning her bereavement pay claim, but would ask McFadden to grant her claim for a day’s pay in lieu of compensatory leave, because he agreed that he (or perhaps some other SEIU agent) had given Mynatt reason to believe that she would get “comp time” for having done some overtime work on SEIU’s behalf in Seattle. After concluding this conversation, Stewart reported the substance of Mynatt’s grievances to McFadden, and per-

¹³⁵ At p. 70 of his brief, under the topic heading, “Union Activities, Knowledge, [and] Animus,” the General Counsel refers solely to the supposed “May 26 meeting” between Mynatt and McFadden as the record basis for the existence of these *prima facie* elements.

¹³⁶ In his memo, Freeland had dismissed this explanation, noting that, in fact, both he and organizer Streeter had been answering the phone from 8 to 9 a.m.

¹³⁷ Mynatt states that in arguing with Freeland on June 1, she told Freeland that “[Rickman Jackson had not had a beeper for a whole week, and he was never written up for having a beeper].” On brief the General Counsel appears to treat Mynatt’s testimony about what she said to Freeland about Jackson as proof that her out-of-court statement to Freeland was (a) true, and (b) constitutes evidence of “disparate treatment.” (G.C. Br. 29, fn. 25; p. 70.) However, where Mynatt was never shown to have firsthand knowledge of the matters asserted, her out-of-court statement to Freeland was classic hearsay, and I give it no weight. Indeed, I regard her admitted statement to Freeland about Jackson as simply one more example of her reflexive

tendency to argue and complain of unfair discrimination whenever she was subjected to supervisory criticism.

sueded her to give Mynatt a day's pay in lieu of compensatory leave.

Although McFadden acceded to Stewart's instruction to pay Mynatt for a day's worth of overtime work she had performed in Seattle, McFadden admittedly resented this latest attempt by Mynatt to do another end-run around the local administration, and it is apparent that Freeland did, too. For on June 11, Freeland issued another memo to Mynatt, this one captioned, "Office Protocol." In that memo, Freeland *again* reminded Mynatt who her bosses were,¹³⁸ and noted that her "communication with Mr. Stewart this morning was disrespectful to me and by extension the administration of Local 434B." He further instructed Mynatt that "[a]nytime you wish to meet or communicate with any of these officials, you must ask and receive permission from me first[.]" and closed the memo with the warning that "[t]his conduct will not be tolerated and you will be subject to termination in the future."

On brief, the General Counsel avers that "the issuance of [this] warning was merely pretextual in nature," and "therefore" (as he reasons) "it was issued because of [Mynatt's] protected activities."¹³⁹ (Again, the "protected activities" the General Counsel refers to here are Mynatt's supposed statements to McFadden in the supposed "May 26 meeting."¹⁴⁰ And again, my findings preclude reliance on such a theory.) Moreover, the General Counsel's charge of "pretext" in the issuance of the June 11 warning itself suffers from significant independent problems: Thus, in claiming pretext, the General Counsel avers that Mynatt was "understandabl[y]" ignorant of the Respondent's "chain of command," and finds it significant, moreover, that no one had ever previously "orally warned" Mynatt "not to speak to Stewart directly." I think both points are nearly frivolous. For one thing, I do not believe Mynatt for a moment when she claims not to have understood as of June 10 or 11 what the "chain of command" was. (Among other things, Stewart had made this clear in his concluding statements at the June 9 meeting, *supra*.) Indeed, I think it far more reasonable on this record to see in Mynatt's call to Stewart that Mynatt was once again simply unwilling to accept that she must "operate within the structure of the administration." And given the history of Mynatt's argumentative and defiant stance towards McFadden and Freeland, I find it not just plausible, but most likely, that when Freeland and McFadden learned of Mynatt's appeals to Stewart, they would likewise see in such action evidence that Mynatt was again being "disrespectful" of their authority, and needed a clear reminder, in the form of a warning in writing, that from now on, Mynatt had better acknowledge who her real bosses were, and stop complaining

to Stewart whenever she felt aggrieved by her treatment at the hands of the local "administration."

(3) June 24 ultimatum memo

In this memo, captioned "Compensation Day and Bereavement Leave," Freeland told Mynatt that, "after receiving instructions from Dan Stewart, you will be paid for one compensation day." He further offered, "for the third time," to pay her for "three (3) days of bereavement leave upon proof of your attendance at the funeral in Arkansas, such as an airline ticket in your name and a copy of the death certificate or a program from the mortuary." He closed this memo with the following admonition,

You have until tomorrow to produce this proof or the matter becomes forever moot[,] and any further discussion of this matter with anyone associated with your work while employed by this union after this day, will result in your immediate suspension for insubordination.

As I have previously found, Freeland had been demanding proof of Mynatt's "attendance" at her brother's funeral since at least March 16, and Mynatt had been evading this demand for several months, apparently because she was unwilling to admit that she had not actually attended the funeral. But neither had she allowed the matter to drop; instead, she had continued to gripe in June to Stewart (among others) about the Respondent's refusal to pay this claim. Considering all this, I do not find it surprising that Freeland would have long since found Mynatt's complaining to be excessive and disruptive, and for this reason alone, would have issued to Mynatt on June 24 what amounted to an ultimatum to "put up or shut up" concerning her bereavement pay claim.

b. Extension of probation in August

On August 24, roughly coinciding with Mynatt's having completed 6 months on the job, Cadorna advised Mynatt by memo that her probationary status would be extended for another 3 months. The memo stated at the outset that Mynatt's "productivity has been inconsistent[,] at best," but acknowledged that this was "due to a number of circumstances. For example, out of state project assignments, bereavement leave, sick time off and car problems." In the next paragraph, Cadorna observed, moreover, "You have proven [sic] that you can do your assignments and accomplish your goals, reflected in the June 7th to July 29th organizing drive in which you recruited the most members." However, in the final paragraphs, under the caption, "Areas That Need Improvement," Cadorna wrote as follows:

During your six (6) months of employment, you have been disciplined for belligerent behavior towards the administration, disrespecting the General Manager, bypassing administrative lines to resolve problems, attempting to supervise and/or meddle in other organizers' affairs, not going through appropriate administrative channels to resolve conflicts with other staff members, [and] easily losing your temper which has alienated you from the majority of the staff members. When these issues are raised with you by the administration, you become argumentative[,] which makes it very dif-

¹³⁸ Thus, Freeland stated in the memo's first paragraph that, while Stewart was the "Director of the SEIU Health Care Organizing Department," McFadden was the Respondent's "General Manager," Cadorna, was the Respondent's "Staff Director, and that Freeland was the Respondent's "Organizing Coordinator," and as such, was Mynatt's "immediate supervisor."

¹³⁹ G.C. Br. 71; see also *id.* at 70.

¹⁴⁰ The General Counsel does not contend that Mynatt's presenting of her personal gripes to Stewart was itself activity protected by the Act, or that the Respondent had no right to curb such behavior. And because no such contention is made, I will not trouble to explain why it would lack merit.

ficult to supervise you and work with you to help you correct the above behavioral problems.

In summation, I'm extending your probation in order to allow you to work on the issues I've stated above. I will review your overall work performance based on your improvement on the above areas on November 15, 1993.

Considering my earlier findings, I don't think Cadorna's judgments require extended discussion. It appears on the face of her memo that Cadorna felt that Mynatt "needed improvement" when it came to her argumentative and disrespectful attitude and behavior towards the local "administration" and her fellow workers, but that Cadorna was prepared to give Mynatt another three months to "work on" these "behavioral problems," before Cadorna would make any final judgment about Mynatt's suitability for retention. From my previous findings, it is plain that Mynatt had, indeed, displayed "belligerence" and "disrespect" for her supervisors, and had been "argumentative" in cases where her supervisors had challenged her actions or defaults. Moreover, both Cadorna and Mynatt, although disagreeing about particulars, at least agree that Mynatt had gotten into disputes with her fellow workers that had required Cadorna to intervene. (Cadorna described instances of conflict between Mynatt and three organizers—Rickman Jackson, Noel Samuel, and Frank Streeter, and Mynatt admits to having had run-ins with both Jackson¹⁴¹ and Samuel,¹⁴² although she claims not to recall having had any problem with Streeter.) Moreover, while Mynatt predictably blamed the other organizers for having "started" the dispute in each instance, or for having treated her rudely and/or explosively, it is easy on

¹⁴¹ Mynatt agrees that a loud and angry exchange developed between herself and Jackson in early or mid-June, after Mynatt had questioned Jackson about his early departure from the office (a departure that Cadorna had authorized, although Mynatt apparently did not know this at the time). Mynatt and Cadorna agree that Cadorna, overhearing the fracas, called Mynatt into an office and explained she had authorized Jackson's departure, and reminded Mynatt that she was not Jackson's "supervisor," and therefore, she had been out of line in thus criticizing Jackson. Further, as Mynatt acknowledges, McFadden herself had upbraided Mynatt in the June 18 organizers meeting for her behavior towards Jackson. (In this regard, the minutes of the June 18 meeting record that McFadden had "cautioned" Mynatt that she must "curtail her uncontrollable outbursts toward other staff members," citing "an incident that had occurred with Rickman Jackson," and "advised Burnell that this type of behavior will not be tolerated.")

¹⁴² Mynatt testified that in August, after she had not attended a rally that the other organizers had attended, Samuel asked her in the presence of other organizers why she hadn't been at the rally. Her account of what happened thereafter includes admissions that she took offense over what she characterized as "rude" behavior on Samuel's part, and that she rebuked Samuel for his rudeness, and told him that he had no business questioning her, which led to additional argumentation between them. Stung by this exchange, Mynatt admittedly then went to Cadorna and asked her to deliver a rebuke to Samuel. Although Mynatt found Cadorna disturbingly unreceptive, she concedes that Cadorna agreed finally to talk to Samuel, and later returned and presented Samuel's side of the story to Mynatt. Admittedly unmollified by Cadorna's intervention, Mynatt states that she then sought out Samuel directly, seeking an "apology" for his "rudeness," which merely served to revive the original argument between them.

this record to believe that Cadorna, for reasons quite unrelated to any pro-union sympathies she may have assumed that Mynatt held, would have seen Mynatt—not the other organizers—as the probable source of such conflicts. Thus, I find, in sum, that Cadorna would have extended Mynatt's probationary period for the very reasons she set forth in her memo, without regard to Mynatt's (largely invisible) association with the Union.

c. November memos

(1) November 8 criticism for no-show at Chavez rally

Background: All the organizers save Mynatt participated in a rally and march held in Los Angeles on Saturday, November 6, to honor the memory of Cesar Chavez, the founder of the United Farm Workers Union, who had recently died. (By all accounts, including Mynatt's, the Chavez rally was to be a major event, and organizer Rudy Barragan, with McFadden's blessing, had been planning and coordinating the attendance of the organizers, and had been urging the organizers to get members from various racial and ethnic communities to appear and march under the Respondent's banner at the event.) On November 4, in a brief memo to "All Organizers," Cadorna had published the final instructions and arrangements for the event, as follows:

You must submit to R[udy] Barragan, a list of union members that will be attending the November 6th march. Please inform all persons needing transportation, that they must report to the 434B office no later than 1 p.m.

Mynatt, under subpoena by the General Counsel, had been in attendance at this trial all day on November 4 and 5, and therefore she had not seen Cadorna's memo, but she admittedly knew about and intended to participate in the rally. However, as she explained on the witness stand, her intention to attend was frustrated by last-minute car problems. And she admitted further that she did not call anyone to advise that she wouldn't be able to get to the rally.

On Monday, November 8, Cadorna questioned Mynatt about her absence from the rally, and Mynatt offered the car problem explanation. Later that day, Cadorna prepared the following handwritten memo to Mynatt, which she gave to Mynatt on the morning of November 9:

I spoke to you today regarding your absence at the Cesar Chavez march and rally. If you had car problems, then you should have paged me and/or leave [sic] a message on the office voice mail. If you couldn't reach me, you could have paged other staff organizers around 1:00 p.m. since this was the time we were all meeting in the office.

This is the last time that I will call your attention to this matter.

Also, you need to resolve your constant car trouble.

Mynatt testified that she was unaware that her attendance at the rally was "mandatory." Her point, apparently, was that she saw it as no big deal if she missed the rally, and therefore, she saw no need to try to find another ride to the rally, or even to call in to the office to report her intended absence. On brief, to support the claim that unlawful motives

caused Cadorna to write the warning memo, the General Counsel advances an argument that appears to involve two starting premises: (1) Mynatt was truthful when she testified that she was unaware that attendance at the rally was mandatory; and (2) Cadorna must have known that Mynatt was thus unaware. (In this latter regard, the General Counsel stresses a fact that Cadorna was admittedly aware of—that Mynatt could not have known of Cadorna’s November 4 memo because Mynatt was at this trial, not in the office, on November 4 and 5.) The next link in the prosecutor’s chain of reasoning is inexplicit, but he apparently infers that, but for some darker ulterior motive, Cadorna’s *awareness* of Mynatt’s *unawareness* of the *November 4 memo* would have caused Cadorna to overlook Mynatt’s absence from the rally, and to forgo writing a warning memo. And from all this, the General Counsel quickly concludes that “Cadorna’s intention was not to legitimately put an employee on notice about failing to perform a required duty, but to punish Mynatt for testifying against the Respondent.”¹⁴³

This chain of reasoning is too fragile at each of its links to sustain the weighty conclusion urged by the prosecution. I don’t believe Mynatt when she uniquely claims she was unaware that her attendance at the rally was mandatory. (Cadorna, and organizers Rickman Jackson, Frank Streeter, and Aram Agdaian testified that *they* knew that attendance was mandatory, and each recalled having been so informed in a “staff meeting,” a meeting that Cadorna and Streeter recalled had been held about two weeks before the rally.¹⁴⁴) And I think the General Counsel has relied on an irrelevancy when he supposes that Mynatt’s unawareness of the November 4 memo would have caused Cadorna to overlook Mynatt’s absence from the rally, but for a desire on Cadorna’s part to “punish Mynatt for testifying against the Respondent.” (The rally, and the mandatory attendance policy, had been announced well before November 4; the November 4 memo merely confirmed last-minute arrangements for the rally; therefore, where Cadorna had no reason to doubt that Mynatt already knew that attendance would be mandatory, it is hardly significant in assessing Cadorna’s motives that Cadorna knew that Mynatt had not seen the November 4 memo.) Moreover, in positing that Mynatt’s recent testimony “caused” Cadorna to write the critical memo, the General Counsel has not just depended on a mechanistic application of post hoc, ergo propter hoc reasoning, he has also conveniently (and myopically) failed to apply such reasoning rigorously; for he has ignored that a significant event of more probable “causative” significance—Mynatt’s no-show—*intervened* between Mynatt’s having testified and her receipt of a warning.

¹⁴³ G.C. Br. 75.

¹⁴⁴ Cadorna and Jackson specifically recalled that Stewart had made such announcements in the staff meeting held 2 weeks before the Chavez rally; Streeter and Agdaian did not identify who had made this announcement, nor when. Stewart denied that he had been the one to announce that attendance would be mandatory; he explained that Cadorna would have been the one to make such an announcement. I regard as insignificant that these witnesses did not fully corroborate one another on certain details, especially where they all appeared to agree in the end that all the organizers were expected to attend the rally, and that this requirement had been made explicit in a staff meeting well before the rally took place.

(2) November 17 criticism for no-show at Watkins’ march, and for offering preposterous excuse

The Respondent’s organizers were likewise expected to participate in another memorial rally for a community leader, one scheduled for Saturday, November 13, this time in Watts, for Ted Watkins, a recently deceased leader in the African American community’s antigang and youth support efforts. Mynatt did not attend this rally, either. But this time, Mynatt did not claim car problems, or any unawareness of the “mandatoriness” of her attendance as her excuse for not showing up. Rather, this time, Mynatt claimed (both to Cadorna on the following Monday, and from the witness stand in this trial) that she feared that McFadden might have her murdered at the rally. What was the source of this fear? We heard many answers from Mynatt, each more elaborate than the last. But in substance, she claimed that she had been worrying since at least June about being injured or killed by McFadden or someone acting for her, and that this fear ripened significantly when, on or about November 8, McFadden stated during a photo session that she would like to “kill all the women,” so that she could “have all the men to herself.”

Seven participants in the photo session were called to testify about it—McFadden, Mynatt, and five other organizers, Agdaian, Streeter, Stevenson, Jackson, and Pinchot. Their memories of what McFadden said are not identical, but they are quite harmonious, and they do not significantly contradict McFadden’s own account, as follows: McFadden and the male and female organizers had posed together in various groupings for snapshots. At some point, McFadden gathered only the men around her for a separate photo, and admittedly remarked that if she could have her own way, she would just “have all the women killed and have all these men to myself and I’d be a happy person.” Four of the organizer-witnesses (Agdaian, Streeter, Stevenson, and Jackson) supported McFadden’s descriptions in every important sense; they agreed that she was in a jocular mood and that her remark was made facetiously, and was so understood, and caused others to laugh. Pinchot—a newcomer who had not yet officially begun work as an organizer on the day of the photo session—does not expressly contradict the first four regarding McFadden’s mood and demeanor, but he nevertheless “thought” that her remark was “rather harsh and peculiar, and it caused me to wonder what sort of person I would be working for.” Significantly, however, only Mynatt claims to have found in McFadden’s remark the whisper of a murder threat directed uniquely against herself.

On November 15, Cadorna questioned Mynatt about her absence from the Watkins rally, and Mynatt offered her fear-of-murder excuse. On November 17, Cadorna wrote and presented to Mynatt a highly critical memo, which summarized their November 15 conversation, and in the process revealed that Cadorna did not take Mynatt’s excuse seriously. Thus, in the final sentence of this memo, Cadorna wrote (emphasis in original),

I fail to understand how you can continue to work with Local 434B[,] as Ms. McFadden *is* the General Manager, or does this mean that you only fear her on Saturdays or during marches?

On brief, the General Counsel appears clearly to embrace Mynatt's fear-of-murder excuse, and he has even tried to find support for Mynatt's fear in Pinchot's testimony that he found McFadden's remark to be "harsh and peculiar." Without bothering to explain the obvious, I think it was Cadorna who was on target in attacking Mynatt's excuse as nonsensical and plainly false, and it is the General Counsel who remains the only *naif* when it comes to this excuse. And in my view, the General Counsel has resorted to perhaps the most empirically unreasonable of all of his applications of post hoc, ergo propter hoc reasoning when he states, in the last sentence of his argument concerning the November 17 memo,

Inasmuch as the Watkins' [sic] warning was received within a 12 day period following the first November day of her [Mynatt's] testimony, *it follows* that Respondent issued this warning to Mynatt because of her testimony in the hearing.¹⁴⁵

(3) November 24 memo

On November 24, Cadorna wrote and delivered to Cadorna a memo summarizing their recent interactions, and recording Cadorna's displeasure with Mynatt's having "editorialized" in her recent reports, and her having "complained and complained" about the difficulties she was experiencing because the "list" of prospects she was being asked to contact included too many people with "Asian" or "Spanish surnames." Cadorna's memo also reviewed the efforts she had made to accommodate Mynatt's complaints, including, allowing Mynatt to select "Long Beach" as an area to work in, and noted that Mynatt had the next day asked to "change to Santa Monica" instead. The underlying and surrounding details are murky, and they do not in any case deserve further exposition, for the General Counsel has not contested the facts set forth in this memo. Rather, on brief, the General Counsel's argument again starts with the *presumption* that Cadorna issued this memo "in order to further punish Mynatt" (for her having testified, apparently) and the balance of his argument suffers from equally unconvincing and speculative forms of bootstrapping.¹⁴⁶

Contrary to the General Counsel, I find nothing in this record that reliably suggests that Cadorna had ulterior motives for issuing the November 24 memo to Mynatt, much less unlawful ulterior motives. Instead, I credit Cadorna that she wrote the memo for the reasons that are implicit within its text—her impatience with Mynatt's continual complaining and excusing.

¹⁴⁵ G.C. Br. at 76; my emphasis.

¹⁴⁶ Thus, the General Counsel further argues (*id.*), that, "Obviously, the Respondent was well on its way of [sic] setting up Mynatt for an accelerated progressive disciplinary scheme to create another one of Respondent's not-so-airtight terminations." Moreover, apparently recognizing that the latter speculation is hampered by the inconvenient fact that Mynatt was still in the Respondent's employ 4 months later, on March 9, 1994, when I closed the trial record, the General Counsel speculates even more egregiously that, "Absent the filing of an amended charge, Mynatt surely would have been unlawfully terminated by the Respondent."

d. Conclusion

I conclude as a matter of law that that in each of the complained of warning memos to Mynatt, the Respondent committed no violations of either Section 8(a)(3) or (4) of the Act. And I will therefore dismiss the complaint insofar as it alleges to the contrary.

THE REMEDY

Because I have found that the Respondent committed violations of Section 8(a)(3) and (1) by discharging Ochoa on May 5, and further violated Section 8(a)(1) by making statements coercive of employees' Section 7 rights in the period May 5–21, my recommended order requires the Respondent to cease and desist from such violations and to post a notice intended to reassure the Respondent's employees that the Respondent will honor their Section 7 rights. Moreover, to remedy its unlawful dismissal of Ochoa, my order requires the Respondent to offer her reinstatement and to make her whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Finally, because Ochoa, as an employee discharged for unlawfully discriminatory reasons, retained her employee status and her right to vote in the July 16 election, my order requires the Regional Director for Region 21 to open her challenged ballot, count it, and then issue a certification appropriate to the final tally of valid votes cast.

On these findings of fact and conclusions of law and on the entire record, I make the following recommended¹⁴⁷

ORDER

The Respondent, Los Angeles County Homecare Workers Union, Service Employees International Union, Local 434-B, AFL–CIO, Vernon, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting Office and Professional Employees International Union, Local 537, AFL–CIO (Local 537) or any other union.

(b) Coercively interrogating employees about their own or other employees' involvement with Local 537, or their reasons for wanting union representation.

(c) Threatening employees with retaliation for having sought representation by the Local 537, including by suggesting to employees that their activities on Local 537's behalf are getting them in trouble with the Respondent's General Manager, or that their jobs are in jeopardy because of such activities, or that they will no longer be permitted time off for unforeseen child care problems, or that other "rules" will be more strictly enforced.

¹⁴⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Coercively suggesting that employees who work for a union have no business wanting independent union representation, and should quit their jobs if they believe otherwise.

(e) Soliciting employees to withdraw their support for Local 537.

(f) Expressly or implicitly promising benefits to employees for abandoning their support for Local 537.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer to Silvia Ochoa immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of this decision.

(b) Remove from its files any reference to the unlawful discharge of Silvia Ochoa and notify her in writing that this has been done and that her dismissal will not be used against her in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due to Silvia Ochoa under the terms of this Order.

(d) Post at its offices in Vernon, California, copies of the attached notice marked "Appendix."¹⁴⁸ Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act that I have not specifically found.

IT IS ALSO FURTHER ORDERED that the Regional Director for Region 21, or her designee, shall immediately open and count the challenged ballot cast by Silvia Ochoa in the elec-

tion held in Case 21-RC-19216 on July 16, 1993, and promptly issue a certification appropriate to the final tally of valid ballots cast.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Office and Professional Employees International Union, Local 537, AFL-CIO (Local 537) or any other union.

WE WILL NOT coercively interrogate employees about your own or other employees' involvement with Local 537, or your reasons for wanting union representation.

WE WILL NOT threaten you with retaliation for seeking representation by Local 537, such as by suggesting to employees that their activities on Local 537's behalf are getting them in trouble with our general manager, or that their jobs are in jeopardy because of such activities, or that they will no longer be permitted time off for unforeseen child-care problems, or that other "rules" will be more strictly enforced, or by suggesting that employees who work for a union have no business wanting independent union representation, and should quit their jobs if they believe otherwise.

WE WILL NOT solicit employees to withdraw their support for Local 537.

WE WILL NOT, directly or by implication, promise benefits to employees for abandoning their support for Local 537.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer to Silvia Ochoa immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges she previously enjoyed and WE WILL make Silvia Ochoa whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL notify Silvia Ochoa that we have removed from our files any reference to her discharge and that the discharge will not be used against her in any way.

LOS ANGELES COUNTY HOMECARE WORKERS
UNION, SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 434-B, AFL-CIO

¹⁴⁸ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."